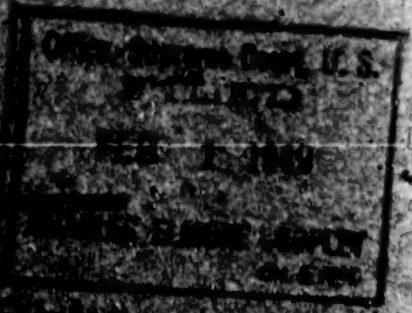

In the Supreme Court of the United States

October Term, 1942

THE UNITED STATES, PETITIONER

v.

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA RAILROAD

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA RAILROAD, PETITIONER

v.

[redacted]

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[redacted]

INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued:

Constitution and Statutes: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 135

THE UNITED STATES, PETITIONER

v.

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA RAILROAD

No. 198

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA RAILROAD, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The report of the Interstate Commerce Commission, Division 5, appears at 192 I.C.C. 779; the later report of the Commission itself in this case appears at 214 I.C.C. 66. Both of these Commission reports are reprinted as Appendix B to

this brief, separately bound. The opinion of the Court of Claims (R. 36) is reported at 110 C. Cl. 330.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1948 (R. 50). The petition in No. 135 was filed on July 1, 1948. The time for filing a petition in No. 198 was extended to August 14, 1948 (R. 195), and the petition was filed on August 5, 1948. Both petitions were granted on December 6, 1948 (R. 195). The jurisdiction of this Court rests upon 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction to increase the rates of compensation fixed by the Interstate Commerce Commission under the Railway Mail Pay Act of July 28, 1916, which provides that the Commission, after notice and hearing, shall "fix and determine * * * the fair and reasonable rates and compensation for the transportation of such mail matter."

2. In the event there is jurisdiction in the Court of Claims, whether that court may substitute its judgment as to what constitutes fair and reasonable rates for that of the Interstate Commerce Commission.

3. Whether the Interstate Commerce Commission properly refused to increase the mail rates to be paid the plaintiff railroad on the ground that existing rates were fair and reasonable.

4. Whether the requirement of the Railway

Mail Pay Act that railway common carriers transport mail for "fair and reasonable compensation", as determined by the Interstate Commerce Commission, constitutes a taking of private property for public use within the meaning of the Fifth Amendment so as to entitle petitioner to recover interest from the United States, as an element of just compensation, for the delay in payment of fully compensatory rates.

5. Whether the portion of the railroad's claim for the period before February 2, 1936, is barred by the statute of limitations.

STATUTES INVOLVED

The provisions of the Railway Mail Pay Act (Act of July 28, 1916, 39 Stat. 412, *et seq.*, 39 U.S.C. 523, *et seq.*) are set forth in Appendix A, *infra*, pp. 86-103.

STATEMENT

A. *The background of this proceeding.*—This action was instituted by receivers for the railroad in the Court of Claims to recover compensation for transportation of the United States mails at rates in excess of those fixed by the Interstate Commerce Commission pursuant to the Railway Mail Pay Act (R. 1, 10, 12).[1] The period involved in this action is from April 1, 1931, through February 28, 1938 (R. 12). Since 1929, receivers,

[1] Alfred W. Jones, the present receiver, was substituted as respondent in No. 135 by order of this Court dated December 6, 1948. Because a petition and a cross-petition have been filed, the parties may sometimes be referred to by their capacity in the court below.

appointed by the United States District Court for the Southern District of Georgia, have operated the insolvent Georgia & Florida Railroad Company, whose lines of railroad extend over 400 miles (R. 13).

Prior to the enactment of the Railway Mail Pay Act, railroads, including the Georgia & Florida, transported mail at rates fixed under contract (R. 13). In 1916, Congress enacted, in the Railway Mail Pay Act, a comprehensive scheme of regulation of mail transportation by railroad common carriers which included detailed rate-fixing machinery. Under its terms, the Interstate Commerce Commission is "empowered and directed to fix and determine from time to time the fair and reasonable rates" at which carriers are required to transport the mails, and a procedure is prescribed whereby rates are to be established only after notice and full hearing (39 U. S. C. 541, 542, 544-554). After six months from the entry of a rate order, either the Postmaster General or a carrier may apply to the Commission for a "reexamination" of the order (39 U. S. C. 553). The Postmaster General has the additional authority to make special contracts with carriers for transportation of mail at higher rates "where in his judgment the conditions warrant" (39 U. S. C. 565). The Act specifies four classes of service of which only two, apartment railway post

office car service and closed pouch service, are involved here (39 U. S. C. 525-530).

Following an elaborate investigation and after extended hearings, the Commission, on December 23, 1919, in its first general rate order under the Railway Mail Pay Act, adopted the space basis as the method for determining and promulgating rates, and prescribed rates of compensation for authorized services to be applicable "on and after January 1, 1918." *Railway-Mail Pay*, 56 I.C.C. 1, 78. On July 10, 1928, the Commission increased the general rates previously fixed. *Railway Mail Pay*, 144 I.C.C. 675.

As of August 1, 1928, the Post Office Department delivered to the Georgia & Florida Railroad statutory authorizations for transporting the mail on regularly scheduled trains of the carrier at the rates prescribed in the Commission's order of July 10, 1928 (R. 21). The carrier accepted these rates without protest until April 1, 1931, when it applied to the Commission for a reexamination of the rates (R. 21). After investigation and hearing, the Commission, on May 10, 1933, denied the application for increased compensation, holding that the established rates were fair and reasonable. (*Railway Mail Pay, In the Matter of the Application of Georgia & Florida Railroad for Increased Rates of Pay*, 192 I.C.C. 779, Appendix B, pp. 1-9 (R. 22-24)). A petition for reconsideration was denied by the Commission (R. 24). There is no

showing that the railroad ever applied to the Post Office Department for contract rates higher than those prescribed by the Commission (R. 94, 101, 131-135, 139).

In a suit brought by the railroad in 1934, in the United States District Court for the Southern District of Georgia, under the Urgent Deficiencies Act (28 U.S.C. 41 (28)), a special three-judge court held the Commission's order unlawful and remanded the case to the Commission for further action (R. 25). Thereupon, the Commission conducted further hearings, and, on February 4, 1936, again found the rates previously established to be fair and reasonable (*Railway Mail Pay, In the Matter of the Application of Georgia & Florida Railroad for Increased Rates of Pay*, 214 I.C.C. 66, Appendix B, pp. 10-28. (R. 25)).

Upon a supplemental bill, the same three-judge court again held the Commission's order unlawful (R. 26). The Government appealed directly to this Court and the decree of the three-judge court was reversed on the grounds that the Commission's order was not reviewable under the Urgent Deficiencies Act because it was a "negative order," and that it was not the type of order comprehended in the Urgent Deficiencies Act because there was no wide public interest in the speedy determination of the validity of railway mail pay orders. *United States* v. *Griffin*, 303 U. S. 226. Following this Court's decision on Feb-

ruary 28, 1938, the railroad continued to carry mail at the rates fixed by the Commission and took no action before the Commission, the Post Office Department, or in the courts until the filing of the petition in this action four years later (R. 1, 58).

B. *The findings of the Interstate Commerce Commission.*—The reports of Division 5 and of the full commission disclose the factual basis of the orders (192 I.C.C. 779, 214 I.C.C. 66, Appendix B). The carrier's claim that the Commission rates were not fair and reasonable as to it is made on the theory that they did not provide compensation for its cost of transporting the mails plus a return of 5.75 per cent on its investment in road and equipment allocable to the mail service (R. 9-11). After it applied for reexamination of the mail rates, a test period of 28 days, for the purpose of obtaining space and other data, was selected (Appendix B, p. 2, R. 21). This information was then analyzed in accordance with a cost allocation formula, referred to as Plan 2, upon which some reliance had been placed by the Commission in determining costs and rates in the first general mail pay order in 1919 (56 I.C.C. 1) and to a lesser extent in the 1928 (144 I.C.C. 675) and other proceedings. Appendix B, pp. 16-17. The railroad's claim to higher rates was based entirely on the results obtained by application of this formula (R. 4, 9-10).

The mail service authorized for this railroad consisted of a 15-foot apartment railway post office car (R. P. O.) and 3-foot closed pouch space (Appendix B, p. 2, R. 26-27). The 15-foot R. P. O. apartment service called for a 15-foot partitioned section of a baggage car fitted with racks to enable a postal clerk employed by the Post Office Department to sort and reassemble the mail en route (R. 26). The 3-foot closed pouch service did not consist of any physically divided space in the baggage car, but permitted the transportation of from 50 to 56 mail pouches, the number which could be stored in a 3-foot section of the car (Appendix B, p. 23, R. 27). The pouches were actually deposited in any convenient space in the car (Appendix B, p. 23, R. 27). The number of pouches carried was normally less than 50, but the rate for this class of service was calculated and paid on the basis of the full 3-foot space unit, regardless of the number of pouches actually carried (Appendix B, pp. 22-23, R. 27).

In making the allocation of cost and investment under Plan 2, an apportionment was first made between passenger train service and freight train service in accordance with prescribed formulae (Appendix B, pp. 4, 11, R. 28).[2] The amount thus

[2] The Commission pointed out that although passenger train service, of which the mail service was a part, contributed only 5.86 per cent of total railway operating revenue, it was charged with 21 per cent of total railway operating expense. Appendix B, p. 6.

apportioned to passenger train service was then further apportioned among passenger proper, baggage and express, and mail services in proportion to the space allocated to these services (Appendix B, p. 3, R. 22, 30). Before the allocation was made, however, all unused space was charged to the services using space in accordance with the formula in Plan 2 (Appendix B, p. 3, R. 22). In these computations, space authorized for mail service was treated as space used although not actually used, whereas baggage and express service were charged only with space actually occupied (Appendix B, p. 3, R. 22). The Commission found that if costs and investment were allocated pursuant to Plan 2, the railroad's mail rates would have to be increased 87.4 per cent to compensate the railroad for the computed expense of providing the mail service and a 5.75 per cent return on investment (Appendix B, p. 5, R. 23).

But the Commission, first through Division 5 and then its full membership, held that fair and reasonable rates for the Georgia & Florida Railroad were not to be ascertained by a mechanical application of the cost formula in Plan 2. Appendix B, pp. 8, 16. At the conclusion of the first hearing, the Commission held that the cost study was "not considered to be an accurate ascertainment of the actual cost of the service" but only an approximation to be given appropriate weight considering all the circumstances, and adverted to

various other factors which were deemed controlling. Appendix B, pp. 8-9. The Commission found that "mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished." Appendix B, p. 8, R. 24.

It noted, too, that "mail revenues have been relatively more stable than the revenues from the other passenger-train services," and that the actual use of the closed-pouch mail units was considerably below their maximum capacity. Appendix B, p. 6, R. 23. The Commission concluded in its first report, that in view of the above described considerations, and in view of the fact that the applicant receives the same rates as those received by other roads for the same kind of service, many of these other roads being in much the same situation as the applicant in respect of passenger-train operations, "the data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like services." Appendix B, p. 9, R. 24.

After the subsequent hearing, the full Commission again adverted to various weaknesses in determining costs by the proposed formula both in general and particularly with respect to the carrier's data, pointing out that costs determined in this fashion constituted but one of several factors ordinarily considered by it in determining fair and

reasonable rates. Appendix B, p. 10. The Commission again emphasized that cost "computed in the manner described is a hypothetical cost and not an actual cost", and pointed out that in other mail pay proceedings consideration had been given to "the amount and character of the unused space reported as operated," "the actual space occupied by mail, as distinguished from authorized space," "comparisons with compensation received from other services in passenger-train cars," and other factors. Appendix B, pp. 16-17.

The Commission then turned to various factors in the instant case which it believed rendered the suggested formula unacceptable as an accurate guide to the ascertainment of costs. It pointed out that included in the unused space allocated to mail service was part of the excess space in a 30-foot R. P. O. apartment which was furnished at various times when a 15-foot apartment was authorized. Appendix B, pp. 17-18. The elimination of this excess unused space alone, which was furnished solely to serve the convenience of the carrier, might have resulted in a profit from the transportation of the mails even on the railroad's theory of cost determination. Appendix B, pp. 17-20. The total unused space in combination cars allocated to passenger, baggage, express and mail service constituted 44 per cent of the total space operated for these services. Appendix B, pp. 19-20.

The Commission also found that "another ele-

ment of doubt as to the reliability of the space study as a basis for determining the cost of service, arises from treating the 3-foot units of authorized mail space as the full space used by mail, regardless of the mail load carried." Appendix B. p. 22. In fact, according to the Commission's statistics, considerably less than half of the amount of space authorized appears to have been used. *Ibid.* In this connection, the Commission also mentioned that the space furnished to meet authorizations for 3-foot units is not set aside for exclusive mail use but is merely available space in the same car used to carry baggage and express. *Ibid.* Further casting doubt on the cost analysis, the Commission notes that its computations did not take into account the fact that "expense of transporting mail per authorized car-foot mile, in view of the service rendered by applicant on its trains in connection with it, might reasonably be considered to be somewhat less per car-foot mile than for passenger-train service as a whole." Appendix B, p. 27.

The Commission also compared the revenue respondents received from the mail service with revenue received for other services and found they were receiving per car-foot mile approximately six times as much revenue from mail traffic as from passenger traffic and approximately two and one-half times as much revenue from mail traffic as from express traffic. Appendix B, p. 24. It also computed the average expense per car-foot mile of

operating the passenger train service and compared this figure with the revenue received for authorized mail space. The average computed expense per car-foot mile for passenger train service as a whole was .66 cent. Appendix B, p. 25. The revenue per car-foot mile of authorized mail service was 1.03 cents, or 56 per cent more than the average computed expense. Appendix B, p. 25. Thus, "revenue per car-foot mile from the authorized space approaches quite closely the hypothetical cost per car-foot mile plus the stated return" for mail service. Appendix B, p. 26. This computation does not include, of course, any distribution of mail revenue to unused space apportioned to mail but does include the unused authorized space. *Ibid.*

The Commission again concluded, "giving consideration to all the computations, the extent and cause of the operation of a substantial portion of the unused space, the fact that a theoretical cost and not actual cost is derived from the methods and plans adopted, and the small amount of mail carried in the authorized units of service * * * that the present rates for transportation of the mail by the applicant are fair and reasonable." Appendix B, pp. 27-28.

C. *The proceedings in the Court of Claims.*—In the court below, the Government introduced evidence to prove that the authorizations to transport mail at the established rates advanced the financial interests of the plaintiff and that these advantages

were recognized by the railroad. In September, 1937, the Post Office Department initiated a study to determine on what routes mail, being carried on mixed freight and passenger trains, could be diverted to other mail or highway routes (R. 103, 104, 171). In June, 1939, the Division Superintendent recommended discontinuance of the 15-foot apartment service on the plaintiff's line between Douglas and Valdosta, Georgia, and the substitution of closed pouch service, which would save the Department $4,870.56 per year (R. 106; 177). The plaintiff strongly protested this proposed discontinuance of their 15-foot apartment service, stating (R. 170):

> The loss of revenue for handling the mails would seriously affect the finances of the railroad and would undoubtedly curtail train service or eliminate passenger train service entirely; in fact I am not sure but that the loss of the mail revenue would result in abandonment of the railroad.

As a result of the protest against eliminating the financial benefit to the plaintiff, the Department determined not to discontinue the route until the railroad voluntarily curtailed its service (R. 192). At no time did the plaintiff ever ask to be relieved of the burden of carrying mail (R. 97).

The Government introduced evidence to prove that between 1931 and 1938, every point of significance on the Georgia & Florida's mail routes

was also served by another mail carrier, both by intersecting railroad lines connecting such points directly with Atlanta, Savannah, or Jacksonville, which are the three metropolitan centers for the region served by respondents, and by highway routes (R. 72-89). The Government offered to prove that the entire service involved in this action could have been adequately replaced at no increase in cost (R. 83, 96-97). The court below found that while the Georgia & Florida Railroad was the only railroad which could furnish R. P. O. apartment car service between the points for which such service was required of the plaintiff during the period here involved, the evidence showed that lines of certain other railroads crossed the line of the Georgia & Florida Railroad and discharged and received mail traffic at such points of passage (R. 35). The mail service by other railroads serving the area covered by the Georgia & Florida route was available at the rates fixed by the Interstate Commerce Commission in its order of July 10, 1928, which were the rates paid the plaintiff railroad (R. 35-36).

The evidence also established that plaintiff's receipts from mail traffic constituted net additions to its revenue (R. 35, 113). The closed pouch service did not require the railroad to incur any appreciable or significant added cost, since this was furnished in cars which had to be hauled in any event (R. 35). Likewise, the 15-foot apartment service did not

entail any significant added cost, since it required the use of only one-quarter of the baggage car on the Augusta-Valdosta run, and that car could not have been cut out from the train even if no mail traffic had been carried (R. 113, 115-116). Moreover, even on the assumption that the R. P. O. apartment required the operation of an additional car, the revenue received for the R. P. O. apartment car service was four times the additional cost to the railroad for operating the car (R. 129). Elimination of mail authorizations to the railroad, therefore, would have resulted in considerable financial loss to the railroad.

The Court of Claims held that the Interstate Commerce Commission had failed to award the carrier an amount sufficient to compensate for costs of operation and a return of 5.75 per cent on investment in road and equipment engaged in mail service by refusing to apply the proposed cost apportionment formula known as Plan 2, and that, in these circumstances, it had jurisdiction to render judgment for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission (R. 44, 48, 50). Relying on the Commission's finding that an increase of 87.4 per cent of the rates paid would be necessary to provide compensation for costs and an adequate return on investment by a mathematical application of the cost allocation formula in Plan 2, the court below held, as a matter of law, that the

application of the formula was mandatory and awarded judgment for $186,707.06 as the amount necessary to render the mail pay fair and reasonable (R. 48, 50). In making this award, the court asserted that it was "giving effect to an order of the Interstate Commerce Commission as properly construed and not determining compensation in an original proceeding under the Fifth Amendment" (R. 49).

SPECIFICATION OF ERRORS TO BE URGED IN NO. 135

The court below erred:

1. In holding, in effect, that under the Railway Mail Pay Act of 1916, it had, in the circumstances of the present case, jurisdiction to determine fair and reasonable compensation for transporting the mails.

2. In holding that on the facts as found and stated by the Interstate Commerce Commission, there is an erroneous conclusion of law by the Commission that the railroad has been fairly and reasonably compensated for their mail service.

3. In holding that the mail rate fixed by the Interstate Commerce Commission was confiscatory and did not fairly and reasonably compensate the railroad.

4. In failing to hold that since the mail traffic bore, in addition to its direct costs, a fair share of the expense of operation and contributed rela-

tively more than the other services for the space furnished, the mail compensation fixed by the Commission was fair and reasonable.

5. In failing to hold that the statutory requirement that the railroad carry all mail tendered is merely one phase of the general obligation imposed on common carriers to transport all traffic whether tendered by the Government or a private person.

6. In failing to hold that the railroad actively sought to retain the mail traffic here involved, and that reasonably similar service could be obtained by the use of other railroads and trade without increasing costs.

7. In entering judgment for the railroad.

SUMMARY OF ARGUMENT

In *United States* v. *Griffin*, 303 U.S. 226, this Court held that the same orders of the Interstate Commerce Commission as are here involved were not reviewable under the Urgent Deficiencies Act. It is the Government's view that the railroad, in this case, mistook its remedy when it brought suit in the Court of Claims and that the Court of Claims erred in assuming jurisdiction over the railroad's claim and awarding judgment to it in an amount in excess of the compensation prescribed by the Commission. While the Government in this case, as in the *Griffin* case, is constrained to press its jurisdictional objections, it urges that even if the Court of Claims had jurisdiction (1) it disregarded the proper scope of a reviewing court's

function, and (2) the Commission's orders under review here are in any event correct. Acceptance by this Court of these views would make unnecessary decision of the jurisdictional question. Moreover, a decision on these questions in this case would resolve an important question relating to the scope of review, bring an end to the litigation and thus best serve the interests of the railroad, the Government, and the courts. While jurisdictional questions cannot normally be by-passed, such an approach would not be unprecedented. *Brooks v. Dewar*, 313 U. S. 354, 359-360; *Inland Empire Council v. Millis*, 325 U. S. 697, 699-700.

I

The Government believes that the Court of Claims would have jurisdiction to award compensation based on rates fixed by the Commission where payment on the basis of established rates has been improperly refused. However, the action of the Court of Claims in the instant case can not be characterized as giving effect to rates established by the Commission or to an order of the Commission. The Court of Claims is here attempting to set aside the rates fixed by the Commission, disregard the orders of the Commission specifically holding these rates to provide fair and reasonable compensation for the Georgia and Florida Railroad, and then establish its own unsound measure of compensation while purporting to rely upon standards of the Commission. In attempting to substitute its judgment as to fair

and reasonable compensation, and thus nullify the rates fixed by the Commission in accordance with the statute, the Court of Claims usurped the functions of the rate-making body selected by Congress.

The statutory provisions and their legislative background unequivocally demonstrate that, in the Railway Mail Pay Act, the Congress intended to set up a regulatory scheme for determining fair and reasonable rates of compensation for transporting mails as part of the Commission's normal function of regulating rates which common carriers by rail may charge shippers. It is settled law that in reviewing rate orders it is not the province of the courts to substitute their judgment of proper rates for that of the legislatively created administrative bodies. When a Commission's determination with respect to rates is deemed to offend constitutional or statutory limitations, the court may do no more than set aside the rate order, require the Commission to fix proper rates, and provide incidental relief. Since the jurisdiction of the Court of Claims is limited to the rendition of money judgments, its powers do not include the judicial functions ordinarily invoked in the review of rate orders. We therefore believe that the Court of Claims is not the proper forum for the review of railway mail pay rates fixed by the Interstate Commerce Commission.

The Court of Claims, however, correctly held the statutory requirement to transport the mails

not to be an eminent domain taking of private property. The jurisdiction of the Court of Claims cannot therefore be predicated upon a right asserted under the Constitution to have "just compensation" judicially determined. The duty to carry the mails was imposed by the statute which also provided a regulatory scheme for fixing fair and reasonable rates of compensation for the service. The requirement of transportation and the method prescribed for fixing rates were considered by Congress not to differ from the statutory duty imposed upon common carriers to provide services to private shippers upon reasonable request therefor and from the rate-making functions exercised by the Interstate Commerce Commission with respect to other rail transportation services. It no longer seems open to question that rate fixing in its usual sense is not eminent domain but merely a form of regulation. There is no reason, therefore, particularly in the light of the Railway Mail Pay Act's legislative history, for treating the regulation of the rates which the United States will be required to pay for rail transportation services any differently from the regulation of rates charged private shippers.

II

Even if jurisdiction to review the mail transportation rate orders of the Commission be found to exist in the Court of Claims, that court never-

theless erred in failing to respect the governing standards for judicial review of the determinations of expert administrative bodies. Notwithstanding the complexities inherent in the regulation of rail transportation charges in general and in the application of cost allocation formulas in particular, the Court of Claims brushed aside the various factors deemed significant by the Commission and insisted upon the use of a single mechanical formula for determining costs attributable to mail transportation, investment in road and equipment, and the fair and reasonable compensation for the mail service. We believe this action constituted a clear intrusion into the area reserved by Congress for administrative expertise. Moreover, although under existing authorities eminent domain concepts appear to have no place in the field of rate-making, the scope of judicial review would not be enlarged if the Court should find that the regulatory scheme constituted a taking under eminent domain. Rate regulation in the past has been considered in terms of eminent domain but the role of the courts in reviewing administrative action was not enlarged by the invocation of that doctrine. However the power exercised be described, the administrative judgment should be respected unless it plainly appears to be without rational support.

III

In the instant case, whatever the scope of review, the Commission decision was correct and should have been left undisturbed. The Commission's refusal to adhere slavishly, without regard for other factors, to the results obtained by the application of a particular cost formula is hardly a proper cause for judicial condemnation. Moreover, in giving but limited weight to the cost formula, the Commission relied upon a variety of factors which have received Congressional and judicial approval, such as a comparison of rates with those charged other shippers for comparable services, and the fact that the railroad operated an excessive amount of unused space the charges for a large portion of which the formula allocated to the mail service. On the railroad's theory and that of the court below, mail rates would have to be increased as the railroad's other business, already inadequate, declined further. Nothing in the Railway Mail Pay Act or the applicable judicial decisions requires the postal service thus to subsidize financially weak carriers.

IV

Although we believe that the reasonableness of the Commission's determinations should be tested in accordance with customary rate-making principles, the railroad is entitled to no greater compensation if traditional standards of "just com-

pensation" in classical eminent domain situations are applied. The owner of the property taken is normally entitled to receive only the market value at the time of the taking. In the instant case, equivalent space for comparable services was sold for less than the charge for the mail space. Other railroads in the same area were more than willing to transport mail at the prescribed rates. Thus the market value would seem to be established at no more than what was actually paid. Even if we assume that plaintiff's costs exceeded this market value, this fact would not be significant. The Fifth Amendment protects only the value of the property taken. It does not guarantee the owner the repayment of his costs or a return on his investment.

V

The railroad's claim to interest on the increased compensation awarded by the court below, asserted in its cross-petition for certiorari, rests on its view that what was here involved was an eminent domain taking. We have demonstrated in point I that this case does not involve eminent domain. It follows that the railroad was not entitled to interest.

VI

Even if the plaintiff railroad properly invoked the jurisdiction of the Court of Claims on February 2, 1942, its claim is barred by the applicable six year statute of limitations to the extent that it refers to the period prior to February 2, 1936.

ARGUMENT

I

The Court of Claims Does Not Have Jurisdiction to Review an Order of the Interstate Commerce Commission Fixing Fair and Reasonable Rates for Transporting Mail

In 1938 this Court held, in connection with the same orders that are involved in this action, that the Commission's orders fixing rates for transporting mail were not reviewable under the Urgent Deficiencies Act. *United States* v. *Griffin*, 303 U.S. 226.[3] The opinion suggested, however, that its decision did not preclude the possibility of other types of review. It was thought not only that a right existed to bring suit in the district courts, but also that the Court of Claims had jurisdiction in suits to recover compensation (1) where an appropriate finding of reasonable compensation had been made by the Commission but an order of payment had been withheld because of an error of law, and (2)

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[3] The dual grounds for that decision were (1) that the order of the Commission was a "negative" order since it merely refused to increase the carrier's compensation fixed under a prior order, and (2) that there was no wide public interest in the speedy determination of the validity of railway mail pay orders which required the special procedures provided by the Urgent Deficiencies Act. Since railway mail pay orders determine the rates at which carriers are required to carry mail and which the Postmaster General is required to pay for its transportation (39 U.S.C. 551, 563), the negative order barrier to review under the Urgent Deficiencies Act would seem to have been removed by the Court's later decision in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125. That decision leaves unaffected, however, the further ground of the absence of a public interest in speedy determination.

where the Commission's order was confiscatory.[4] In this case, as we shall show in Subsection V, *infra*, pp. 28-30, the action of the Court of Claims cannot be brought within its legitimate jurisdiction to award reasonable compensation as found by the Commission but withheld because of an error of law. Although it is possible to construe the opinion of the Court of Claims as awarding additional compensation because of its view that the order of the Commission was confiscatory, we shall show in Subsections B, C, and D, *infra*, pp. 30-49 that the assumption of jurisdiction on this theory would be inconsistent with the legislative purpose to enact a regulatory scheme with the Interstate Commerce

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[4] "*Fourth.*—The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. Co.*, v. *United States*, 271 U.S. 603. Compare *United States* v. *New York Central R. Co.*, 279 U.S. 73, affirming 65 Ct. Cl. 115, 121. And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645; *North American Transportation & Trading Co.* v. *United States*, 253 U.S. 330, 333; *Jacobs* v. *United States*, 290 U.S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity arising under the postal laws, 28 U.S.C., § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell* v. *United States*, 300 U.S. 276, 288, 289. * * *" 303 U.S. at 238.

Commission as the rate fixing agency (see *United States* v. *New York Central R. Co.*, 279 U.S. 73, 79) and with the traditional role of the courts in the rate-making process. Since we are of the further opinion that no other basis exists for the exercise of jurisdiction by the Court of Claims, we urge that it improperly entertained the instant suit.

We wish to suggest to the Court, in this connection, however, that in the light of the course these proceedings have taken during the past fifteen years and of the additional inconvenience and expense which will be suffered by the interested parties should the Government's view as to the lack of power of the court below be accepted, this may be an appropriate case in which the merits of the controversy should first be considered. When the railroad's attempt to obtain a review of the Commission's order under the Urgent Deficiencies Act was before this Court previously in the *Griffin* case (303 U.S. 226), although the Government felt constrained to present the arguments against jurisdiction under that Act, it stated its preference that the case be decided on the merits (Brief p. 17, note 4). Similarly, in this case, although we proceed, in this section, to discuss the jurisdictional obstacles to this suit, acceptance of the remainder of our argument, to the effect that properly confined judicial review of the Commission's orders must lead to a rejection of the railroad's claim, would make decision of the jurisdictional question

unnecessary. And if the railroad's claim is rejected on its merits, as we think it must be on any theory of judicial review, there will be no occasion, in this case, to reconsider paragraph Fourth of this Court's opinion in the *Griffin* case, respecting the tribunal in which the railroad may properly secure judicial review of the Commission's orders. Such a bypassing of jurisdictional questions, though unusual, is not without precedent. *Brooks* v. *Dewar*, 313 U.S. 354, 359-360; *Inland Empire Council* v. *Millis*, 325 U.S. 697, 699-700.

A. The Railroad's Action Was Not Based on an Order of the Commission

Admittedly, the Court of Claims would have jurisdiction of an action to recover compensation based upon rates fixed by the Commission which had not been paid because of an error of law. The court below apparently adopted this theory when it stated that "we are giving effect to an order of the Interstate Commerce Commission as properly construed and not determining compensation in an original proceeding under the Fifth Amendment" (R. 49). The plaintiff's petition in the Court of Claims and the court's opinion, however, constitute a direct assault on the rates established and reasserted by the Commission to be fair and reasonable for the services provided by the railroad. An action which assails the rates fixed by the Commission as not fair and reasonable is obviously not

one in which "the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding." *Griffin* case, 303 U.S. at 238. This conclusion is confirmed by an analysis of the cases cited by the Court in support of the statement just quoted. Neither *Missouri Pacific Railway Co.* v. *United States*, 271 U. S. 603, nor *United States* v. *New York Central*, 279 U.S. 73, involved attacks on the rates fixed by the Commission. In the *Missouri Pacific* case, the only question was whether, as a matter of construction of the provision in the Railway Mail Pay Act directing payment to land-grant lines of only eighty per cent of compensation otherwise paid, the Commission properly applied that land grant provision not only to space actually used for the transportation of mail but also to that used for carrying mail distribution facilities. In the *New York Central* case, the only question was whether rates fixed by the Commission should be operative from the date of the Commission's order or from the date of the filing of the carrier's petition for increase. It is thus plain that the language from this Court's opinion in the *Griffin* case, above quoted, cannot fairly be construed to authorize an attack on the rates themselves.

The court's assertion that it was merely giving effect to an order of the Commission is obviously

rested upon its baseless assumption that the Commission had adopted so-called Plan 2 as a formula for determining mail transportation costs (R. 46). As pointed out *infra* p. 59, the results obtained from the use of Plan 2 were expressly rejected by the Commission as the sole and controlling factor in determining fair and reasonable railroad mail rates. In the instant case, the Commission regarded the cost allocation formula as particularly unreliable because of other supervening factors. In computing fair and reasonable compensation by a mathematical application of this formula alone, the Court of Claims clearly ignored the Commission's order establishing fair and reasonsubmit that in so doing, it acted inconsistently with the provisions of the Railway Mail Pay Act, and beyond the proper scope of its jurisdiction.

B. Congress Contemplated the Customary Scheme of Rate Regulation

The intention of Congress to establish a traditional rate-making system with the customary limited judicial review is clear from the provisions of the statute. At the time of its enactment in 1916, the Railway Mail Pay Act prescribed "rates of payments for the services authorized" (39 U.S.C. 531) as an interim basis of compensation until other rates were fixed by the Interstate Commerce Commission. 53 Cong. Rec. 11228, 11243, 11246-11248. The same statute required the Com-

mission "as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation" for transporting mail, and to publish its determinations. 39 Stat. 429, 39 U.S.C. 542. This section also provided that "orders so made and published shall continue in force until changed by the Commission after due notice and hearing."

A detailed procedure was prescribed "for the ascertainment of said rates and compensation". 39 U.S.C. 544. The Postmaster General was required to file with the Commission a comprehensive plan for transporting mail by the railroads containing "what he believes to be the reasonable rate or compensation the said railway carriers should receive." 39 U.S.C. 546. Upon appropriate notice the carriers were required to answer and the Commission was directed to "proceed with the hearing as provided by law for other hearings between carriers and shippers or associations" 39 U.S.C. 547. "For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification." 39 U.S.C. 549. The Commission was required, "at the conclusion of the hearing", to "establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transporta-

tion of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier . . . such rate or compensation." 39 U.S.C. 551. To carry out these functions, the Commission was "vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers." 39 U.S.C. 554.

The statutory provisions thus display an unmistakable purpose to adapt ordinary rate regulation techniques to the determination of rates of compensation to be paid carriers for transporting mail. Under the prescribed procedure, rates for units of service are established which are to remain effective until modified. This authority to fix rates or compensation for the future is obviously a rate-making function. *Arizona Grocery Co. v. Atchison, T. & S.F.Ry. Co.*, 284 U.S. 370.[5]

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[5] Congress, in the Railway Mail Pay Act, contemplated a regulatory scheme differing from that typically used in the case of private carriers and private shippers, only in that it insisted that the Commission consider the relation between "the railroads as public-service corporations and the Government, and the nature of such service as distinguished, *if there be a distinction*, from the ordinary transportation business of the railroads." 39 U.S.C. 543 (italics supplied). It is plain, from this provision, that Congress itself made no finding that railway mail pay was a field plainly different from ordinary railroad transportation; it left to the Commission the plenary and unfettered power to make a judgment as to any special regulatory provisions that it might deem appropriate. Congressional recognition of the relation involved as being between "public-service corporations and the Government" hardly

The statutory design to subject mail transportation charges to a regulatory scheme but little different from that in effect for carriers and other shippers is confirmed by its legislative history. The present provisions of the Railway Mail Pay Act which relate to the duty of common carriers to transport mail and to the determination of rates of compensation by the Interstate Commerce Commission originated in an amendment, offered by Senator Cummins of Iowa and ultimately adopted, which establishes the present system of regulating railway mail service. 53 Cong. Rec. 9692. In discussing his proposed amendment, Senator Cummins made clear his purpose to have mail offered for transportation by the United States treated in much the same manner as other types of traffic offered by private shippers (53 Cong. Rec. 9697):

> * * * I think the railways of this country, by virtue of their organization and by the service which they proclaim, are bound to carry the mails if tendered by the Government, just as they are bound to carry passengers and freight when required by proper tender, and their compensation for the service ought not to be fixed by any contract; it ought to be fixed upon precisely the same basis as the compensation for every other service is fixed.

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suggests that the requirement that these corporations carry the mail constitutes an eminent domain taking; if anything, contrary inferences would be more justifiable.

He emphasized this concept at a later point when he stated (53 Cong. Rec. 9697):

> * * * The railway companies of this country are under no obligation to carry the mails other than the obligation which arises out of their function as common carriers, out of the power and authority of Congress to declare their railways post roads; and the Government of the United States can no more require a railway to carry the mails for less than adequate compensation than can Congress require the railways to render service to a private shipper for less than a fair and reasonable compensation. There is no other relation than that * * *.

He then indicated his view that the same method in use for regulating rates generally should be employed in determining mail transportation charges. "The carriers of this country are now being regulated along perfectly well-known lines," he explained. "Our experiment in controlling the rates of the railways of this country has advanced to a point where the rules which determine the adjustment are well known, however difficult they may be of application. I am not prepared to abandon the experiment. I believe it is successful—as successful as we find any other effort in dealing with a most complicated and difficult system." 53 Cong. Rec. 9697. He goes on to state that the tribunal which regularly fixes the rates paid for transporting commodities, "which must

ultimately say whether the rates on these articles are adequate or not, should also have the authority to say what the Government shall pay for the transportation of its mails." 53 Cong. Rec. 9698. "I do most earnestly insist that the same tribunal which fixes the rates for the great public shall fix the rates for that public organized in a Government." *Ibid.*

Senator Cummins stated that "my amendment puts the Government of the United States in the hands of the Interstate Commerce Commission, precisely as we put every citizen of the United States in the hands of that commission, and when the commission declares what is reasonable compensation it binds not only the railway companies but binds the United States as well, and that is thereafter the compensation to be paid for the service rendered." 53 Cong. Rec. 9694. "I think we ought to have the same confidence in the commission with respect to the service which we require as a Government that we compel the citizens of this country to have in the establishment of rates which they must pay." *Ibid.*

When questioned with respect to whether his amendment "provides for an appeal in this case as in other rate-making cases before the Interstate Commerce Commission," Senator Cummins responded that it "would permit the same review, although the present law does not permit an appeal." He continued to explain that "under the

present interstate-commerce law if the rates are confiscatory the railway companies can bring a suit for an injunction and in that way the validity of the order of the Interstate Commerce Commission is tested, but under the present law the shipper has no remedy whatever. The decision of the Interstate Commerce Commission as to the shipper is final. * * * There would be the same remedy precisely under my amendment for the railway companies that now exists in the case of the establishment of a rate for a private shipper." 53 Cong. Rec. 9694.

It is clear that the sponsor of the regulatory provisions now contained in the Railway Mail Pay Act intended to extend, with necessary adaptations, the system of regulating railroad common carriers in effect with respect to private shippers to the mail shipments of the United States and to have the same considerations govern the duties of the carriers and the determination of fair and reasonable mail transportation rates. The Congressional purpose to make the regulation of rates for transporting mails but a part of the general regulation of common carriers by the Interstate Commerce Commission is thus apparent. This is confirmed by the provision in the Transportation Act of 1940 that "the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail" 49 U.S.C. 65.

C. The Court of Claims Has No Power to Fix Rates Under the Railway Mail Pay Act or to Order Revisions of the Commission's Rate Orders

Congressional recognition that rate-making for mail purposes involves complexities and requires expertness of the same nature as rate-making for other purposes, together with the manifest purpose of Congress to establish a supplementary regulatory scheme for mail transportation of the same character as the existing scheme for other transportation, compels the conclusion that the Court of Claims was not granted the authority it assumed in this case.

An action in the Court of Claims for a money judgment, like that at bar, does not provide the appropriate mechanism for judicial review in the complex field of rate regulation which Congress has committed to the recognized expertness of the Interstate Commerce Commission. The procedure provided by the Railway Mail Pay Act for notice and hearings (39 U.S.C. 547, 553, 554), together with the direction to the Commission "to fix and determine" fair and reasonable rates, imports a Congressional purpose to place sole responsibility for determining railway mail pay rates on the Commission and not on the courts. *See United States* v. *New York Central*, 279 U. S. 73, 79; *cf. Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177. Under such a statute, although it is a part of judicial

duty "to restrain anything which, in the form of a regulation of rates" operates to deprive a carrier of a constitutional right, "the courts are not authorized to revise or change the body of rates imposed by a legislature or a commission." *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 399; *West v. C. & P. Tel. Co.*, 295 U. S. 662; *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349; *Central Kentucky Co. v. Commission*, 290 U. S. 264. As stated in Mr. Justice Black's concurring opinion in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 608, "the problem of rate-making is for the administrative experts, not the courts" and the functions of the courts "should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review." The limited review which such a delegation as is made by the Railway Mail Pay Act may be deemed to contemplate (see *infra*, pp. 49-58) is not consistent with a proceeding in a court which can exercise no revisory power over the Commission and one in which the sole relief available is a money judgment. Cf. *Shields* case, *supra*.

The limited scope of the jurisdiction of the Court of Claims is not open to question. It has been "uniformly held, upon a review of the statutes creating the court and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States." *United States v.*

Sherwood, 312 U. S. 584, 588.[6] Thus, the Act of March 3, 1863, 12 Stat. 765, which first authorized the Court of Claims to give final judgments, was construed to preclude entertaining an action to compel the issuance of a military bounty land warrant. "Although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a more extended cognizance of cases, yet it is quite clear that the limited power given to render a [money] judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government." *United States* v. *Alire*, 6 Wall. 573, 575-576. And in *Bonner* v.

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[6] The Court of Claims was first established by the Act of February 24, 1855, 10 Stat. 612, to hear and determine certain claims against the Government of the United States, and also all claims which might be referred to the court by either House of Congress. The court was to keep a record of its proceedings in each case and make a report to Congress for the action of that body. By the Act of March 3, 1863, 12 Stat. 765, the court was for the first time authorized to render final judgments. At the next session of Congress, this statute was amended because of this Court's decision in *Gordon* v. *United States*, 2 Wall. 561, restricting appeals from the Court of Claims. 14 Stat. 9. In 1887, the preceding acts were combined into the Tucker Act (24 Stat. 505), under which the Court of Claims was given jurisdiction to hear and determine "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable . . . ."

United States, 9 Wall. 156, which also arose under the Act of 1863, the Court of Claims was held to be without jurisdiction to entertain a suit for a money judgment based upon an alleged breach of trust by the United States because the cause of action was equitable in nature.

Although the Tucker Act of March 3, 1887, 24 Stat. 505, broadly conferred jurisdiction upon the Court of Claims in cases not sounding in tort, "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable," this Court ruled that "in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands." Had the intention of Congress been to go farther than this, "some provision would have been made for carrying into execution decrees for specific performance." *United States* v. *Jones*, 131 U. S. 1, 18; *District of Columbia* v. *Barnes*, 197 U. S. 146, 152. Thus the Court of Claims has exercised equitable jurisdiction where relief could be granted by the award of a money judgment (*Olympia Shipping Corp.* v. *United States*, 71 C. Cls. 251, 262; *United States* v. *Milliken Imprinting Co.*, 202 U. S. 168), but not otherwise. The Court of Claims has itself ruled that it has no power to grant petitioner the right of discovery

(*Blenkner* v. *United States*, 65 C. Cls. 18), to set aside a fraudulent conveyance of land (*Leather* v. *United States*, 64 C. Cls. 388); or to try title to office through the extraordinary remedy of certiorari, mandamus, or quo warranto (*Hart* v. *United States*, 91 C. Cls. 308). Jurisdiction under the Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, was disclaimed on the ground that it contemplated "a proceeding equitable in nature and foreign to any jurisdiction the court has heretofore exercised." *Twin Cities Properties* v. *United States*, 81 C. Cls. 655, 658.

Since the jurisdiction of the Court of Claims is so confined, it is apparent that review of the actions of administrative tribunals, which, when properly exercised, does not extend to making awards on the basis of judicially revised standards but is limited to setting aside administrative orders and remanding for further proceedings if the initial order is found to be defective, must be considered outside the scope of a proceeding in that court. See *supra*, pp. 37-38. The Court of Claims has recognized that "The question of reasonableness of tariff rates and routes is one over which this court has no jurisdiction. It has been committed by Congress to the Interstate Commerce Commission." *Southern Railway Co.* v. *United States*, 100 C. Cls. 175, 197-198, affirmed on other grounds, 322 U. S. 72. And as to the Railway Mail Pay Act itself, before the decision in the *Griffin*

case, it was the well settled rule in the Court of Claims that Congress had designated the Interstate Commerce Commission as the tribunal to fix mail rates and that the Court of Claims had "no jurisdiction * * * to fix the compensation for the carrying of the mails." *New Jersey & New York R. R. Co.* v. *United States*, 80 C. Cls. 243, 248; *Pere Marquette Railway Co.* v. *United States*, 59 C. Cls. 338, 345; *cf. Denver & Rio Grande R. R. Co.* v. *United States*, 50 C. Cls. 382. In the *Griffin* opinion, the court referred, without disapproval, to two of these decisions. 303 U. S. at 238. We submit that the possibilities for review suggested in the *Griffin* case do not warrant the abandonment of this rule.

D. The Jurisdiction of the Court of Claims Cannot Be Predicated on a Theory of Eminent Domain

The railroad has attempted to sustain the jurisdiction of the Court of Claims on the theory that it is authorized to determine "just compensation" in eminent domain cases and that the statutory duty imposed upon common carriers to transport mail gave rise to a taking of the railroad's property under the Fifth Amendment, Pet. in No. 198, pp. 8-10. The court below rejected this theory of the railroad's claim and we believe properly so. There is no showing that the railroad was required to remain in operation, that it was required to run

any trains specially for the mail service, or that it was required to add any cars to regularly scheduled trains to transport the mails. On the contrary, the evidence points to the fact that it was not required to assume additional burdens and that authorizations to carry mail were continued to aid the railroad's precarious financial condition (R. 94, 97, 100, 113, 115-116).

The duty to transport mail, under conditions which do not interfere with the ownership, possession, or operation of the railroad and in circumstances which confer an overall benefit to the railroad, does not constitute an eminent domain taking of private property under the Fifth Amendment. Cf. *United States* v. *Spowenbarger*, 308 U. S. 256, 264, 266-267. "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 12 Wall. 457, 551. To constitute a taking, there must be an actual appropriation of some property right. It is not enough that use of the property has been restricted in some manner or that there has been a decrease in its value because of some Governmental action within the lawful scope of another legislative power. For Governmental action short of acquisition of title or occupancy to amount to a taking, its effects must be "so complete as to deprive the owner of all or most of his interest in the subject matter."

United States v. *General Motors*, 323 U. S. 373, 378; see, *e.g.*, *United States* v. *Welch*, 217 U. S. 333; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546.

The statutory requirement that railway common carriers transport the mails (39 U.S.C. 541), does not differ significantly from the duty imposed upon carriers generally to furnish transportation service "upon reasonable request therefor." 49 U.S.C. 1 (4). The obligation to carry the mails at fair and reasonable rates of compensation determined after administrative hearings does not, therefore, involve a taking of private property for public use any more or any less than the equivalent duty of common carriers by rail to transport freight for the public. *The Pipe Line Cases*, 234 U. S. 549. We have seen that when Congress enacted the Railway Mail Pay Act it intended to exercise its regulatory powers over railroad common carriers, *supra*, pp. 30-36.

The determination of reasonable rates at which utilities are required to serve the public is properly considered a regulation of the use of property within the scope of the police power and not an exercise of eminent domain. *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591, 601; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 582; *Munn* v. *Illinois*, 94 U. S. 113, 134; cf. *Nebbia* v. *New York*, 291 U. S. 502, 534-539. The duty of public service corporations was

emphasized in the dissenting opinion of Mr. Justice Cardozo in *Interstate Commerce Commission* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, 47, where he stated:

> The time has gone by when the subjection of a public service corporation to control and regulation by the agencies of government is to have its origin and justification in the terms of a supposed contract between the corporation and the state. The origin of the subjection and its justification are to be found, not in contract, but in duty, a duty imposed by law as an incident to the enjoyment of a privilege. The discretion of managers and stockholders, at one time nearly absolute, is now subject in countless ways to compulsion or restraint in the interest of the public welfare.

In addition, the limited scope of judicial review traditionally exercised in railroad rate cases (see, *e.g.*, *New York* v. *United States*, 331 U. S. 284, 331, 349) and the recognition that rate-making is essentially a "legislative power" (*Munn* v. *Illinois*, *supra*, at 133-134; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, *supra*, at 586) are inconsistent with the view that the regulatory measures constitute an exercise of the power of eminent domain. Thus the opinion of Mr. Chief Justice Stone in the *Natural Gas Pipeline* case, states (p. 586):

> The Constitution does not bind rate-making bodies to the service of any single formula

or combination of formulas. Agencies to whom this *legislative power* has been designated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstanes. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, *the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped.* If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end. [Italics supplied].

The inapplicability of the eminent domain concept to rate-making is emphasized in the concurring opinion of Mr. Justice Black (p. 603):

> * * * when property is taken under the power of eminent domain the owner is "entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken." *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343. But in rate-making, the owner does not have any such protection. We know, without attempting any valuation, that if earnings are reduced the value will be less. But that does not stay the hand of the legislature or its administrative agency in making rate reductions. As we have said, rate-making is one species of price-fixing. Price-fixing, like other forms of social legislation, may well diminish the value of the property which is regulated. But that is no obstacle to its validity.

Eminent domain concepts are no more appropriate to determining fair and reasonable rates of compensation for transporting mail than they are in the general field of rate-making. As indicated, under eminent domain the owner is entitled to the money equivalent of the property taken. The rates which a public utility is allowed to charge, however, determine the value of this property. Obviously, therefore, eminent domain value cannot determine rates if rates in turn determine value. As stated in the *Hope Natural Gas* case, "'fair value' is the end product of the process of rate-making not the starting point" (p. 601). "The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." *Ibid.* The rates which the railroad will be permitted to charge the Government for transporting mail or for any other transportation service form as integral a part of the enterprise's anticipated earnings as its income from any other source. They contribute to the value of the enterprise in the same manner as earnings from other types of traffic. The fairness and reasonableness of mail transportation rates are no more susceptible to measurement by eminent domain tests than are the rates to be charged private shippers for other services.

The fact that the Government may be the bene-

ficiary of a governmental regulation of property does not convert the regulation into an eminent domain taking. *Lichter* v. *United States*, 334 U. S. 742; *Lincoln Electric Co.* v. *Forrestal*, 334 U. S. 841; *Dayton-Goose Creek Ry. Co.*, 263 U. S. 456; cf. *Lynch* v. *United States*, 292 U. S. 571; *Horowitz* v. *United States*, 267 U. S. 458, 461; *Providence Bank* v. *Billings*, 4 Pet. 514, 561; *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 60-61; *United States* v. *Commodore Park*, 324 U. S. 386. In the *Lichter* case, the Court explicitly stated that "the recovery by the Government of excessive profits received or receivable upon war contracts is in the nature of the regulation of maximum prices under war contracts * * * rather than the requisitioning or condemnation of private property for public use" (p. 787). Nor does the fact that compensation is a constitutional requisite (*United States* v. *New York Central R. Co.*, 279 U. S. 73, 78) imply, as the railroad suggests (Pet. in No. 198, pp. 8-10) that the constitutional requirement is "just compensation" as for a taking.[6a] The Court of Claims was clearly correct, therefore, in holding that the determination of reasonable rates for transporting mail did not involve a taking of private property for public use.

[6a] Similarly, the opinion in the *Griffin* case does not support the theory of a taking. The reference to the *Great Falls*, *North American*, and *Jacobs* cases (see n. 4, *infra*, p. 26), we believe, suggests the possibility of Tucker Act jurisdiction, based upon a constitutional right rather than upon the particular constitutional right involved in those cases. And the determination of "the *quantum meruit* for carrying the mail" (*Griffin* case, p.

II

The Question of Jurisdiction Aside, the Court of Claims Exceeded the Proper Scope of Judicial Review

The Interstate Commerce Commission has given varying degrees of weight in different proceedings to the results obtained from the use of the Plan 2 cost allocation formula. In the instant case, the Commission evaluated the results indicated by the cost formula, specified a number of factors which rendered it unreliable in the peculiar circumstances of this situation, adverted to a variety of other considerations of significance in the rate-making process, and concluded in a closely reasoned and well-supported opinion that the rates paid for transporting mail were fair and reasonable. See Appendix B. The Court of Claims, without analyzing or giving any weight to the weaknesses to which the Commission pointed, treated the formula as establishing the cost of transporting mail, measured this against the income received, computed a loss, and, without making any allowance for the other factors relied upon by the Commission, held that the railroad was entitled to recover its hypothetical expenses and a return of 5.75 percent on its hypothetical investment attributed to mail service through the Plan 2 formula. This resulted in an increase of 87.4 percent of the rates considered fair and reasonable by the Commission. We shall show that in its summary rejection of the factors deemed

237) does not import a taking. See *Union Pacific Railway Co. v. United States*, 116 U.S. 154, 158.

significant by the Commission, the court below departed from established standards employed in the judicial review of administratively determined rates. Moreover, even if the determination of mail pay rates be considered an eminent domain instead of a regulatory function, we shall show that the scope of review is similarly limited.

A. Standards of Judicial Review

Even if it be assumed that there is jurisdiction in the Court of Claims to review the determination of the Interstate Commerce Commission, the court failed to give appropriate scope to the informed judgment of the expert administrative agency to which Congress delegated the function of prescribing "fair and reasonable" rates for transporting mail. *Ayrshire Collieries Corporation* v. *United States*, No. 25, this Term, decided January 3, 1949; *New York* v. *United States*, 331 U.S. 284; *Gray* v. *Powell*, 314 U.S. 402; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111. Thus, "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow." *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139-140. And even when, as here, the administrative order is said to be confiscatory, "If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result," the judicial inquiry is at an end. *Federal Power Com-*

mission v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586. See also *New York* v. *United States*, 331 U.S. 284, 334-340; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 601-603.

With particular reference to the fixing of rates, this Court has stated that "as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne." *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 54.

The complexities involved in determining the proper proportion of the railroads' cost and investment to be allocated to carrying the mails (see *Railway-Mail Pay*, 56 I. C. C. 1-120; 144 I. C. C. 675-727), confirms "the wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process." *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546. "The determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated." *New York* v. *United States*, 331 U.S.

284, 335. The effect to be given a cost study is peculiarly within the province of the Commission and if "the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts." *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481.

Notwithstanding the various possible formulae producing different results discussed by the Commission for the allocation of costs in the mail pay proceedings, the recognized deficiencies inherent in each of the formulae, the variation in the results achieved by apparently irrelevant changes in the basic data, and a host of other imponderables considered at great length by the Commission, the court below insisted upon the mathematical application, to the exclusion of all other factors, of a single formula for cost allocation which the Commission had consistently held was entitled only to limited weight along with various other relevant factors. See pp. 7-13, *supra*.[7]

This was the very antithesis of relegating to administrative responsibility the "task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation" and an attempt at judicial "appraisal of elements having delusive certainty." *United States* v. *Morgan*, 313 U.S. 409, 417. Although it

[7] The court's misconception of the reviewing function is illustrated by its statement that "it was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return" (R. 48).

has been said that courts are not "at liberty to prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it rather than to courts" (*I. C. C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 691), the court below in effect prescribed a precise formula. This is a far cry from the most recent pronouncement of this Court in the field of rate regulation to the effect that in fashioning the rate structure there in issue "there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field." *Ayrshire Collieries Corp.* v. *United States*, No. 25, this Term, decided January 3, 1949, slip opinion, p. 18.

The court's disregard of the Commission's expertness and the substitution of its own judgment for that of the Commission in this highly technical area of the specialized field of rate-making constituted a clear invasion of the field of administrative discretion.

B. The Standards of Judicial Review Are Not Different Even If Rate-Making Be Deemed Eminent Domain

We do not believe the scope of review would be altered if the statutory scheme for regulating rail-

way mail transportation be regarded as a taking of private property under eminent domain. The theory that rate-making involved eminent domain was prominent in rate cases until rejected by recent decisions. See *supra*, pp. 42-48. It must have been considered a peculiar area of eminent domain, however, since the role of the courts in determining "just compensation" did not resemble that played in classical eminent domain situations.

The rule that a rate was confiscatory unless it enabled the utility to earn a fair return on the present fair value of its property was based on the doctrine in the law of eminent domain that "just compensation" must be paid for property "taken" for public use. The Court pointed this out in *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 671, saying:

> * * * When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation * * * is a reasonable rate of return upon that value.

The historical development of the fair value rule shows that the law of eminent domain was in fact its source. At first, in *Munn v. Illinois*, 94 U.S. 113, and companion cases, the Court held that "the people must resort to the polls, not to the courts" for protection against abuses in rate regu-

lation (94 U.S. at 134). Later, however, the Court receded from this view and held that the question of the reasonableness of rates was a judicial question (*Railroad Commission Cases*, 116 U.S. 307, 325, 331; *Chicago &c. Ry. Co.* v. *Minnesota*, 134 U.S. 418), pointing out that unreasonably low rates could not validly be prescribed because that would amount to a deprivation of property without due process of law or a taking of property without just compensation. *Railroad Commission Cases*, 116 U. S. 307, 325, 331; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 179; *Chicago &c. Ry. Co.* v. *Minnesota*, 134 U. S. 418, 458; *Budd* v. *New York*, 143 U.S. 517, 547. Then, in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, the "fair value" rule emerged; the Court invalidated a rate order under which the company could not pay even one-half of its bond interest and said, *obiter* (p. 410):

> * * * If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?

At about the same time, the lower court in *Smyth* v. *Ames*, 169 U.S. 466, held that the principles of eminent domain must apply in rate regulation, saying (*Ames* v. *Union Pacific Ry.*, 64 Fed. 165, 177 (C.C. D. Neb.));

> Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which [it] would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be judged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. * * *

And the analogy of a "taking" was expressly referred to again in *Smyth* v. *Ames*, 169 U.S. 466.

Thus this test extracted from the law of eminent domain became the basis of the "fair value" rule of *Smyth* v. *Ames* for determining the constitutionality of rates. See Henderson, *Railway Valuation and the Courts*, 33 Harv. L. Rev. 902, 906-912; Hale, *Conflicting Judicial Criteria of Utility Rates*, 38 Col. L. Rev. 959, 960-964. As we have shown, the rule was still placed on that basis as late as *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U.S. 662. See also *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51, and the dissenting opinion of Mr. Justice Reed in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. at 620.

The employment of the eminent domain analogy,

however, did not enlarge the traditional scope of review in rate cases. The compass of judicial examination of administrative action was still kept within narrow limits despite discussion of the problem of regulation in terms of eminent domain. Although the use of this concept may have resulted in a judicially established standard of a fair return on a fair value, it did not countenance a substitution for administrative expertness of the Court's judgment with respect to such matters as the proper allocation of cost factors and the pertinence of charges for comparable services. Thus, notwithstanding adherence to an eminent domain theory this Court in *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, and *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 54, for example, stressed the limited function of judicial review. In the *West* case, the Court explicitly said (295 U.S. 662, 679-680): "It is not our function, and was not the function of the court below, to do the work of the Commission by determining a rate base upon correct principles." Accordingly, return to an eminent domain theory in this case would not invoke different principles of review.[8] See also the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stockyards* case, at p. 78, and the dissenting opinion of Mr. Justice Reed in the *Hope Natural Gas* case, at pp. 620-621.

[8] The Government's brief in *United States* v. *Ores*, No. 132, this Term, presents the view that the Constitutional standard of "just compensation" may be given content by legislative action in the same manner as other Constitutional standards

Since the determination of adequate compensation was appropriately committed to the Interstate Commerce Commission, whether the delegated rate-making function be considered an exercise of the power of eminent domain or a regulation under the commerce or postal power, "the sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious." *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 185.

III

The Commission Correctly Denied the Railroad's Application for Higher Rates

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas" *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586. The court below was clearly in error, therefore, in holding that fair and reasonable rates must be determined by application of a particular formula which compelled compensation for abnormal amounts of unused space not devoted to transpor-

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and that the legislative judgment is entitled to the same deference that is accorded it in other areas. We believe comparable arguments may be made with respect to the delegation of the function to administrative agencies. Because of our view that in the field of rate regulation the standards of review are the same whether or not eminent domain is deemed to be involved, we do not present extended argument on the point.

tation of the mails. Moreover, whatever the appropriate scope of review, the factors relied upon by the Commission in the present situation to impugn the validity of the results indicated by the cost study and to justify a departure from giving sole consideration to cost and return on investment in determining rates, are not only intrinsically sound but find support in the Railway Mail Pay Act and the decisions of this Court.[9]

A. The Court's Formula Was Not the Commission's Formula

The statement of the Court of Claims that it was not making its own determination of fair and reasonable rates but was merely correcting the Commission's error of law and applying the proper rule of law to the Commission's findings erroneously assumes or asserts that the Commission had adopted Plan 2 as the proper method of determining mail cost and investment (R. 43, 44, 49). But the Commission had clearly rejected Plan 2, on the basis of a variety of valid considerations, as a controlling formula for determining mail costs and reasonable rates. In its first report in 1933,

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[9] The Commission has on numerous occasions granted the applications of carriers for increased railway mail pay. *Railway Mail Pay*, 85 I.C.C. 157; *Railway Mail Pay*, 95 I.C.C. 204; *Railway Mail Pay*, 95 I.C.C. 493; *Railway Mail Pay*, 96 I.C.C. 43; *Railway Mail Pay*, 104 I.C.C. 521; *Railway Mail Pay*, 109 I.C.C. 13; *Railway Mail Pay*, 112 I.C.C. 151; *Railway Mail Pay*, 120 I.C.C. 439; *Railway Mail Pay*, 123 I.C.C. 33; *Railway Mail Pap*, 144 I.C.C. 675; *Railway-Mail Pay*, 151 I.C.C. 734; *Railway Mail Pay*, 269 I.C.C 357.

on the request for reexamination of the mail rates paid the railroad, the Commission pointed out that the cost formula which it had used in originally fixing rates was not "an accurate ascertainment of the actual cost of service," but was merely "an approximation to be given such weight as seems proper in view of all the circumstances". Appendix B, p. 8. Even prior to its order with respect to the railroad's application for reexamination, the Commission had clearly recognized in its general mail pay order of July 10, 1928 (144 I. C.C. 675), that the results obtained under the cost allocation formula were more theoretical than actual. This report not only discussed the inadequacies of this method of cost determination (144 I. C. C. 675, 691-692), but clearly rejected it as a single criterion for determining rates of compensation. Although application of the formula indicated a rate increase of 25 per cent (144 I. C. C. at 688), an increase of only 15 per cent was allowed. 144 I. C. C. at 695.[10]

The rejection of the Plan 2 formula in the instant case was made crystal clear when the Commission pointed out, on the rehearing of the application for reexamination, that it had consistently, in its mail pay proceedings (citing references), given consideration to factors other than the hypothetical cost obtained by application of the space-study method, such as the amount and character of a railroad's unused space, the actual

[10] It is not even clear that the rates fixed in the original general mail pay order were based on a mathematical translation of the cost formula. 56 I. C. C. 1.

space occupied by mail as distinguished from authorized space, comparisons of compensation received from mail service with compensation received from other services in passenger-train cars, comparisons with freight rates, comparisons of the computed cost of, and revenue from, mail service and mail revenue with the computed cost of corresponding units in passenger-train service as a whole, and the character of the service performed in connection with transporting the mail. Appendix B, pp. 16-17. The lower court's computation of rates on the Plan 2 formula was, therefore, not an application of the law to the findings of the Commission. The Commission had found that the Plan 2 formula was inapplicable. Its use by the court below was simply an independent judgment that a particular formula properly measured fair and reasonable rates despite a contrary finding by the Commission, a finding, which, on the record in this case, is binding upon the Court of Claims and every other court.

B. The Commission's Consideration of Other Factors Was Clearly Appropriate.

The Commission plainly was acting within the proper scope of its discretion when it undertook to test the cost allocation formula against the facts of the particular case and when it gave weight to such other factors as comparative rates for comparable services and the value of the services to the shipper. The unreliability of cost allocation

formulas has received recent recognition in this Court. *United States* v. *Felin & Co.*, 334 U. S. 624. The peculiar competence of expert administrative bodies to deal with the subtle, complex and often baffling problems presented in attempting properly to determine the proportion of expenses to be attributed to particular services has long been established. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 481; *New York* v. *United States*, 331 U. S. 284, 335. And it is no longer open to dispute that in the determination of a fair and reasonable rate it is appropriate to consider other factors than the cost of providing the service and the rate of return on the investment employed in providing the service. As early as *Smyth* v. *Ames*, *infra*, and as recently as *Federal Power Commission* v. *Hope Natural Gas Co.*, it was held that the reasonable value of the service to the consumer as well as the rate of return to the utility is a proper factor in determining a fair and reasonable rate. In the recent case of *Ayrshire Collieries Corporation* v. *United States*, No. 25, this Term, decided January 3, 1949, the propriety of adopting a system of rate-making disregarding comparative distances "which encourages competitive production and a more even development of an area" was made clear. This decision also restates the long standing rule that unduly discriminatory or unduly preferential rates

may be invalid without consideration of adequacy of return. Statutory provisions against discrimination among shippers, as well as the specific provisions and the legislative background of the Railway Mail Pay Act, would seem to underscore the propriety of the Interstate Commerce Commission's comparison of mail revenue with other revenue in determining the reasonableness of rates. The application of these principles in the instant case demonstrates the unassailability of the rates fixed by the Commission as reasonable.

1. *Factors in cost allocation.*—Many of the factors referred to by the Commission as undermining the validity of the Plan 2 cost formula in other proceedings were present here. The cost figures were found to be unfairly weighted against the mail traffic, because space in the baggage car was allocated to mail traffic on the basis of the total space authorized, although the mail traffic actually used considerably less than the authorized space. Appendix B, pp. 22-23. Excessive amounts of unused space were also found to mitigate against complete dependence on the cost formula. Although a 15-foot apartment was authorized, the railroad at times furnished a 30-foot apartment for its own convenience and a portion of the additional 15 feet of unused space was allocated to the mail traffic. The Commission found that forty-four per cent of the total space in combination cars moved was unused and a substantial proportion of this unused

space was allocated under the cost study method to the mail traffic. Appendix B, pp. 19-20. If no part of the extra 15 feet of the 30-foot apartment were allocated to mail traffic, the reduction in expense charged to the mail traffic would have resulted in a computed profit. Appendix B, pp. 19-20.[11] Furthermore, the Commission found that the cost of operating the space actually authorized for mail, omitting allocated unused space, compared with the rate paid for this space, permitted a generous return on investment. Appendix B, pp. 25-26.[12]

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[11] The railroad contends that its use of a 30-foot apartment at various times when a 15-foot space was ordered (R. 26) was of no consequence because the unused space would have been the same in any event. Br. in Opp. pp. 26-28. This argument rests on the assumption that the unused 15-feet of the 30-foot apartment would have remained unused had it been available for express and baggage, as it would have been if not included in a postal apartment. The Commission expressly refused to make this assumption. Appendix B, p. 19. On the contrary, it found that if the "amount of unused space due to the operation of the 30-foot apartment in lieu of a 15-foot apartment . . . were eliminated from the total apportioned to mail and assigned to the other services upon the assumption it was and is unnecessarily operated in so far as mail is concerned, an assumption justified upon this record, . . . the computed mail expense would be reduced to . . . $1,711 less than the revenue." Appendix B, p. 20.

[12] The following findings of the court below are not without significance: Receipts from mail traffic—approximately $250,000 for the period 1931-1938—constituted net additions to revenue (R. 35, 116, 129). Neither the 15-foot apartment service nor the closed-pouch service furnished by respondents required them to incur any significant costs which they would not have incurred even if they had carried no mail whatever (R. 35, 116).

Thus, when the railroad supplies a 30-foot apartment, although a 15-foot apartment is required, the effect of the decision below would be to require the Government to pay double compensation for space which it does not use. Wholly apart from the question whether the Commission has the authority to disregard some or all of the authorized but unused space in fixing rates, there is a serious question whether it is legally permissible to increase the cost to the Government through the use of oversized equipment.[13] The statute provides that "the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths." 39 U.S.C. 532. The legislative background indicates that the provision was intended to free the Government from additional costs imposed upon it through the use of oversized equipment. Senate Hearings on H.R. 10484, 64th Cong., 1st sess., p. 9; 51 Cong. Rec. 13405; H. Doc. 1155, 63d Cong., 2d sess., p. 100; Preliminary Report and Hearings of the Joint Committee on Postage on Second-Class Mail Matter and Compensation for the Transportation of Mail, January 24, 1913, to April 3, 1914, pp. 861-

[13] Tabulations made by the Office of Railway Mail Adjustments of the Post Office Department disclose that a total of 9,069,053 sixty-foot car miles of unused space were operated by mail-carrying railroads during the year 1946 as a result of the use of oversized post-office cars and apartments. An additional 4,638,950 sixty-foot car miles of unused space were operated as a result of the use of oversized storage cars.

863. In addition, several decisions of this Court suggest that fair and reasonable rates are not required to include compensation for unused capacity which is not devoted to the service of the customer. *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439; *Public Service Commission* v. *Utilities Co.*, 289 U. S. 130, 135; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 590; cf. *Atchison, T. & S. F. Ry.* v. *United States*, 225 U. S. 640. Whether or not it is permissible to include the cost of operating unused space in mail rates, it seems clear error for a reviewing court to make the inclusion of such cost mandatory.

To permit the mechanical rule announced by the Court of Claims to stand would impose upon the Government large and unjustified liabilities. As previously shown, the cost allocation formula upon which the court below calculated its judgment was employed by the Interstate Commerce Commission in 1919 in the first general mail pay case, 56 I.C.C. 1. The rates promulgated at that time used this formula for estimating the average cost to all the railroads of transporting the mails. General rates for all similarly classified railroads, as contemplated by the statute (39 U.S.C. 549), Appendix A, *infra*, p. 96, were then fixed. Although this formula has not been the single basis for fixing rates since that time, the court below applied the formula to the particular cost of op-

erating plaintiff's railroad. It must be clear that Congress did not contemplate, when it authorized general rates, that each railroad whose operating costs exceeded the average would be able to recover additional compensation based on its higher operating costs. Where an average of costs is computed, it is reasonable to expect that the costs of approximately one-half the railroads will exceed the average and the remainder will fall below it. On the theory of the court below, a general order fixing rates on some such a common denominator basis would in effect fix rates for only half the railroads. Those performing better than average would be permitted to retain their better than average compensation and those performing worse than average would be permitted to recover additional compensation. It is inconceivable that the statutory provision for general rates contemplated, or any rule of law requires, this result. See *Bowles v. Willingham*, 321 U. S. 503, 518; *New England Division Cases*, 261 U. S. 184.[14]

The core of the problem in the instant case seems to be the financial straits in which the railroad has found itself almost from its establishment. The railroad was incorporated in 1926 and has been in receivership ever since 1929 (R. I). Its difficulty seems to be an inability to obtain sufficient business, as indicated by the Commission's finding

[14] See the dissent of Commissioner Eastman from the 1928 general increase order, which attacks the cost allocation formula adopted by the court below as unsatisfactory regardless of any special circumstances. 144 I.C.C. 675, 725-727.

with respect to unused space. This does not entitle it to obtain a subsidy from the Government in the form of "reasonable" rates by charging the cost of excessive unused space to mail transportation. As a consequence of the mechanical allocation of all unused space to the various services including the mail, the amount of unused space apportioned to mail would necessarily increase as the amount of other traffic decreased. Thus, the fairness and reasonableness of mail rates would depend on the amount of other traffic carried. The *reductio ad absurdum* of this mechanical cost allocation would be that if there were no other traffic the entire cost of operation would have to be charged to transportation of mail. Certainly such a result would not be admissible except in a situation in which the Government required the railroad to continue in operation for the sole purpose of carrying the mail. In this case, on the contrary, as we have seen, the railroad resisted the Government's effort to withdraw from this carrier a substantial part of the mail service authorized.

No rule of law requires that regulated rates to be reasonable must guarantee a carrier a profit. Where inability to earn a profit results from ordinary business factors there is no Constitutional requirement that rates be increased. This was forcefully pointed out in *Market Street R. Co.* v. *Comm'n*, 324 U. S. 548, 566-567, in the following language:

> It is idle to discuss holdings of cases or to distinguish quotations in decisions of this or other courts which have dealt with utilities whose economic situation would yield a permanent profit, denied or limited only by public regulation. * * * They [the considerations applicable in above situations] obviously are inapplicable to a company whose financial integrity already is hopelessly undermined, which could not attract capital on any possible rate, and where investors recognize as lost a part of what they have put in. It was noted in the *Hope Natural Gas* case that regulation does not assure that the regulated business make a profit. * * * Without analyzing rate cases in detail, it may be safely generalized that the due process clause never has been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.

See also *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586.

2. *Comparison with rates charged for other services.*—The Commission pointed out that, based on space units which included proportionate amounts of unused space, "the mail service pays considerably more for equivalent units of service than passenger proper, or express. * * * Upon a computed unit-of-service basis, the amount paid by the department for carrying mail was about two and one-half times as much as the amount received by applicant from carrying express and about six times as much as the amount received for passenger service proper." Appendix B, p. 24.

The propriety of using this favorable comparison of railway mail rates with charges for other passenger services is clear. The Railway Mail Pay Act specifically authorizes the Postmaster General to arrange for the transportation of other than first class mail at rates not exceeding those charged express companies for the transportation of express matter, and requires the railroads to carry mail at these rates. 39 U. S. C. 557.[15] The statute also contemplates that arrangements may be made for conveying mail in freight trains "for which rates not exceeding the usual and just freight rates may be paid." 39 U. S. C. 555. At other times, Congress has indicated a policy of requiring transportation of mail by railroad at fair and reasonable

[15] In each year during the period 1930-1947, non-local first class mail approximated less than 6 per cent by weight of all other mail. United States Post Office Department, Cost Ascertainment Reports for years 1930-1947.

rates not to exceed the rates paid by private parties for the same kind of service. See statute discussed in *Union Pacific Railway Co.* v. *United States*, 116 U. S. 154. In determining fair and reasonable rates, a proper element for consideration was said to be the charges for comparable passenger train service. *Id.* at 155-156. The power of Congress to provide for, and the duty of carriers to observe, equality of rates among shippers has long been established. 49 U. S. C. 2 and 3. Not even "self-interest of the carrier" may "override the requirement of equality in rates." *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 524. The power of the Commission to determine and prescribe just and reasonable rates to eliminate unjust discrimination and undue preference has recently been confirmed. *Ayrshire Collieries Corp.* v. *United States, supra;* see also *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 685; *New York* v. *United States*, 331 U. S. 284, 344-346. Against this background it cannot seriously be urged that the Commission acted arbitrarily in giving weight to the charges made to other shippers for comparable services. The weakness of the contrary view becomes plain when it is remembered that at least the rates for express services are not imposed by the Commission but are voluntarily fixed by the plain-

tiff railroad,[16] and that the railroad has not shown that it has ever attempted to secure authorization for increased passenger rates which would bring those rates into line with the existing mail rates.

The legislative history of the Railway Mail Pay Act demonstrates that in the enactment of 39 U. S. C. 557, Congress considered express traffic comparable to non-first class mail traffic and wanted the Government to pay no more than the express companies. Appendix A, *infra*, p. 98. All of the commissions appointed to investigate the subject of railway mail pay had made the relationship of express and mail rates the subject of study.[17]

On August 24, 1919, a joint Congressional Committee, better known as the Bourne Commission, was appointed to inquire into the question of railway majl pay.[18] This committee attempted to make a detailed comparison between the relative earnings by railroads from express and mail and the char-

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[16] See *Increased Express Rates and Charges*, 1946, 269 I.C.C. 161, and 266 I.C.C. 369.

[17] Hubbard Commission in 1878 (S. Mis. Doc. 14, 45th Cong. 2d sess.); Elmer-Thompson-Slater Commission in 1883 (H. Ex. Doc. No. 35, 48th Cong., 1st sess.); Wolcott-Loud Commission, a congressional commission, in 1901 (S. Doc. No. 89, 56th Cong., 2d sess.); Hitchcock Commission in 1911 (H. Doc. No. 105, 62d Cong., 1st sess.); Bourne Commission, a congressional commission, in 1914 (H. Doc. 1155, 63d Cong., 2d sess.).

[18] The section of the act authorizing this joint committee was the so-called Parcel Post Act of 1912 (Act of August 24, 1912, 37 Stat. 539, 557).

acter of service rendered for these classes of rail traffic.[19]

The legislative history of the Railway Mail Pay Act shows the extensive efforts to compare the rates received by the railroads from the Post Office Department with the rates received by the railroads from express companies.[20] As a result, Congress

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[19] Preliminary Report and Hearings of the Joint Committee on Postage on Second-Class Mail Matter and Compensation for the Transportation of Mail of the Congress of the United States (Bourne Commission), January 24, 1913, to April 3, 1914, pp. 199-201, 360-361, 437-445, 502-507, 650-651, 695-698, 743-758, 773-777, 783-788, 893-895, 1162-1164, 1271-1280, 1304-1316, 1334-1341, 1352-1361, 1390-1401, 1481-1489, 1509-1511; H. Doc. 1155, Report of the Joint Committee on Postage on Second-Class Mail Matter and Compensation for the Transportation of Mail (Bourne Commission Report), August 31, 1914, 63d Cong., 2d sess., pp. 90-94.

As a development in these hearings, the Post Office Department modified its two prior legislative proposals and incorporated Section 557 in its present form in the so-called "Third Plan" and "Fourth Plan" of the Department. H. Doc. 1155, 63d Cong., 2d sess., August 31, 1914, pp. 76, 80. The "Fourth Plan" was embodied in H. R. 17042, 63d Cong., 2d sess., which did not pass the Senate; and again in H.R. 19906, 63d Cong., 3d sess., the Post Office Appropriation Act for 1916, from which the Senate struck the provisions relating to railway mail pay.

[20] This statutory history is fully discussed in the debates on H.R. 10484, 53 Cong. Rec. 9693, 9825-9830, 11246, 11248-11249, 11252.

See also footnote ; Hearings on H.R. 17042 before the Senate Committee on Post Offices and Post Roads, 63d Cong., 2d sess., August 18, 20, and 26, 1914, pp. 81-82; Hearings on H. R. 17042 before the House Committee on the Post Office and Post Roads (revised), 63d Cong., 2d sess., June 5, 1914, p. 29; Debates on H.R. 17042, 63d Cong., 2d sess., 51 Cong. Rec. 13395-6, 13402-3, 13408; Hearings on Bills relating to Railway Mail Pay before the Senate Committee on Post Offices and Post Roads, 63d Cong., 3d sess., January 13 and 14, 1915, pp. 87-89; Debates on H.R. 19906, 63d Cong., 3d sess., 52 Cong. Rec. p. 777; Hearings on Post Office Appropriation Bill, 1917, before Subcommittee No. 1 of the House Committee

became thoroughly familiar with the problem of making a comparison of mail and express rates. It had before it the contentions of the railroads with respect to dissimilarities in the circumstances and conditions of mail and express services, as well as the opposing views of the Post Office Department and others. By its enactment of Section 557, Congress resolved the issue and concluded that the services performed in connection with the transportation of non-first-class mail and express were so similar that discrimination in favor of express would be unjustifiable. Hence, machinery for equalization of the rates for these two classes of services was provided in Section 557.

In the debates on H.R. 17042, 63d Cong. 2d Sess., a bill which failed of Senate passage but which was closely related to the Railway Mail Pay Act as finally enacted, Chairman Moon of the House Committee on the Post Office and Post Roads stated:

> This provision is directed to the ascertainment of a rate which the railroad companies would derive from the carrying of express

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on the Post Office and Post Roads, 64th Cong., 1st sess., December 1915 and January 1916, Part III, pp. 672-3, 681, 775; Hearings on Bills relating to Railway Mail Pay before the Senate Committee on Post Offices and Post Roads, 64th Cong., 1st sess., March 20, 21, and 22, 1916 (Trunk Lines), p. 36-7—March 22 and 23 (Short Lines), p. 36; Hearings on H.R. 10484 before the Senate Committee on Post Offices and Post Roads, 64th Cong., 1st sess., April 14, 15, 17, 18, and 19, 1916, pp. 74-76; Debates on H.R. 10484, 64th Cong., 1st sess., 53 Cong. Rec 2318, 2464-5, 3217-19, 9695-6, 9830, 9833.

matter that is analogous in character and method of transporting to mail matter.[21]

In the House debates on H.R. 19906, 63d Cong., 3d Sess., the purpose of what became 39 U. S. C. 557 (Appendix A, *infra*, pp. 98-99) was stated to be as follows:

* * * * * *

MR. LEWIS of Maryland. * * * The Postmaster General, under this clause, would have the right to go to the Interstate Commerce Commission and get what would be necessary to him as a shipper, namely, an equal rate.

* * * * * *

MR. MADDEN [a member of the House Committee on the Post Office and Post Roads]. Here is what it authorizes: It authorizes the Postmaster General to ascertain from the Interstate Commerce Commission what the express companies pay the railroad companies, and if he finds the express companies are paying the railroad companies less than the Government is paying them, then he has the right

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[21] 51 Cong. Rec. 13408; see also Hearings on H.R. 17042 before the House Committee on the Post Offices and Post Roads (revised), 63d Cong., 2d sess., June 5, 1914, pp. 28-29; Hearings on H.R. 17042 before Senate Committee on Post Offices and Post Roads, 63d Cong., 2d sess., August 18, 20, and 26, 1914, pp. 81-82; Hearings on Bills relating to Railway Mail Pay before the Senate Committee on Post Offices and Post Roads, 63d Cong., 3d sess., January 13 and 14, 1915, p. 79; Hearings on Bills relating to Railway Mail Pay before the Senate Committee on Post Offices and Post Roads, 64th Cong., 1st sess., March 22 and 23, 1916 (Short Lines), p. 70.

to demand the same rate that the express companies are paying the railroads.

* * * * * *

MR. LEWIS of Maryland. * * * We find the express companies are paying only 18 cents per car mile, and we find that fact by going to the Interstate Commerce Commission. Then we have the right to demand of the railroads that they will carry everything except first class, which is the kind of stuff carried by express companies, at the rate of 18 cents per car mile. The railroad can protect itself by raising its rate to the express companies. If it will not do that, it ought to protect the Government by giving it equal rates as a shipper as anybody else. The Government is entitled to equal rates as a shipper. That means a rate as low as any other kind of shipper of the same matter, and the object of the clause is to secure to the Government as a shipper an equality with every other kind of shipper.[22]

* * * * * *

The hearings on H.R. 10484 (which became the Railway Mail Pay Act) before the Senate Committee on Post Offices and Post Roads,[23] which were read into the record on the floor of the Senate when Section 557 was specifically debated, reflect the same purpose. Senator Husting first described Section 557 as one of "certain special provisions in the bill as passed by the House which, first, would

[22] 52 Cong. Rec. 776-777.
[23] 64th Cong., 1st Sess., April 17, 1916, pp. 45-46.

enable the Postmaster General to arrange for the transportation of mail matter other than first class at rates not exceeding those which the Interstate Commerce Commission should find to be paid by express companies to the railroad companies for the transportation of express matter," and then quoted the testimony of the draftsman of the bill before the Committee, as follows:

> SENATOR HARDWICK. The object of these provisions to which you have referred and read into the record is to extend that economy further on those classes of mail?
>
> MR. STEWART. Yes, sir; and also to secure, through the instrumentality of the Interstate Commerce Commission, the same rates for this mail matter as the railroads charge the express companies.[24]

The conclusion is inescapable that Congress intended the Government to be given the benefit of rates which would place it in a position of equality with the express company as a shipper. In giving consideration to charges for other types of passenger train traffic, particularly express, the Commission was carrying out a clearly indicated policy of Congress.

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[24] 53 Cong. Rec. 9825.

IV

The Decision of the Court of Claims Is Not Sustained by Traditional Judicial Standards of "Just Compensation"

Even if traditional judicial standards of "just compensation" are invoked, the railroad is entitled to no additional compensation. This Court has stated that just compensation "means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken * * *." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304. The most reasonable and satisfactory criterion which the courts have devised for determining just compensation (although perhaps not the perfect one, *United States* v. *Miller*, 317 U. S. 369, 374) is the market value of the property at the time of the taking, expressed in terms of dollars and cents. *Albrecht* v. *United States*, 329 U. S. 599; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377; *United States* v. *General Motors Corp.*, 323 U. S. 373, 379; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 275; *Olson* v. *United States*, 292 U. S. 246, 255; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 124; *L. Vogelstein & Co., Inc.* v. *United States*, 262 U. S. 337, 340; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 80.

Where there is in fact no market in which the property in question is being actively bought and sold, market value is determined by judicial postu-

lation of such a market and ascertainment of "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy * * *." *Olson* v. *United States, supra*, at 257; *Brooks-Scanlon Corp.* v. *United States, supra*, at 124. But where an actual market does exist, and there is trading in the commodities requisitioned, there is no need to resort to judicial hypothesis, and the prevailing market prices become the determinant of market value and of just compensation. *L. Vogelstein & Co., Inc.* v. *United States, supra; United States* v. *New River Collieries Co.*, 262 U. S. 341; *C. G. Blake Co.* v. *United States*, 275 Fed. 861 (S. D. Ohio), affirmed, 279 Fed. 71 (C. A. 6). In such circumstances, "The worth of a thing is the price it will bring." *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 158.

Cost is never the criterion for determining market value of a commodity and fair compensation for its taking. "It is the property and not the cost of it that is protected by the Fifth Amendment." *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123. "* * * the Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment." *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 285. See, also, *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *New River Collieries Co.*, 262 U. S. 341,

344; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328.

Nor does the fact that the market prices were regulated impair their effectiveness in proper circumstances as the measure of fair compensation. With a ready market, market prices remain the best measure of market value. There is no logic in disregarding actual market prices because they may reflect conditions in the market which are imposed or spring from governmental intervention. They still measure the money equivalent of what the owner could receive for his property. This is particularly true in a case like the present where it seems certain that the owner could obtain no more were the market a free one and where the property taken (principally the use of car space) could not be preserved for future sale in a better market.

The language of the concurring opinion of Mr. Justice Reed in *United States* v. *Felin & Co.*, 334 U.S. 624, to the effect "that whenever perishable property is taken for public use under controlled-market conditions, the constitutionally established maximum price is the only proper standard of 'just compensation'" (p. 643) is peculiarly pertinent here, since the services "taken" by the Government were "perishable" in the sense that the railroad could not withhold them from the current market.

The record in this case indicates that the rates fixed by the Commission were at least as high as

they would be on a free, unregulated market. This is shown by the desire of other carriers to furnish the service at the established rates (R. 96-97), and further corroboration is furnished by the fact that the rates fixed by the Commission for transporting mail yielded a greater return to the carrier than the applicable rates, which, in part at least, were the result of voluntary action by the railroad, for comparable units of passenger, baggage and express traffic. *Supra*, pp. 70-71-72. Finally, the willingness of the plaintiff railroad to sell space for mail transportation, and its resistance to the loss of this business at the established rates, indicate that the market price, though Government-regulated, was nevertheless a genuine one.

Even if the Commission's rates were lower than they would have been on a free market, other language of Mr. Justice Reed in the *Felin* opinion is pertinent (pp. 645-646):

> It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their perishable property to the general public at a fixed price or not to sell to anyone and later to hold that the Government must pay a higher price than the general public where it requisitions the perishable property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to

> the general public at ceiling prices was hardly less severe. * * *

Similarly, in *L. Vogelstein & Co., Inc.* v. *United States*, 262 U. S. 337, this Court approved the prevailing market price as a standard of just compensation, without considering perishability, although that price was fixed with the approval of the President and did not necessarily reflect conditions of supply and demand in a free market unhampered by war conditions.

The contemplated objectivity of the Congress in providing for the present system for determining railway mail rates is evidenced by the system devised of having the Postmaster General and the carriers appear in opposing roles before the Interstate Commerce Commission. See, *e.g.* 39 U.S.C. 545-548. Moreover, it is clear that the regulation by the Interstate Commerce Commission of transportation charges for mail was conceived by Congress to be but another aspect of its general rate-making duties in the field of rate-transportation, and ordinary standards of determining fair and reasonable rates were intended to be made applicable. The Government sought no special advantage. See *supra*, pp. 30-36. The rates of general application fixed by the Commission therefore represented at least the current market value of the services and could be considered a proper measure of "just compensation."

V

The Railroad Is Not Entitled to Interest On Its Judgment

The railroad in its cross-petition (No. 198) contends that the Court of Claims erred in refusing to allow interest on the principal amount of the judgment awarded as additional compensation for transporting mail. This claim is grounded upon the theory that the duty to transport mail under the provisions of the Railway Mail Pay Act constitutes a taking of property which entitles the railroad to "just compensation" under the Fifth Amendment. Admittedly, if there had been a taking of property in the eminent domain sense, the prohibition against the allowance of interest on claims prior to judgment would not apply.[25] *Jacobs* v. *United States*, 290 U.S. 13; *Seaboard Air Line* v. *United States*, 261 U.S. 299, 302. The Court of Claims, however, held that it was not determining just compensation and denied the claim for interest. For the reasons set forth in Point I, D, we believe that the Court of Claims was clearly correct in its decision that there was no eminent domain taking. It follows, therefore, that the railroad may not recover interest. See, e.g.

[25] Section 177(a) of the Judicial Code (28 U.S.C. [1946 ed.] 284(a)) reads as follows:

> No interest shall be allowed on any claim up to the time of rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. . . .

This section is now embodied in 28 U.S.C. 2516.

United States v. *Thayer-West Point Hotel Co.*, 329 U.S. 585.

The inapplicability of eminent domain concepts in the instant case is emphasized by the railroad's claim for interest "from the respective times when the pro rata portions of said amount [the additional compensation claimed] became due" (R. 11-12). This presumably refers to the time of the periodic payments made by the Postmaster General for transporting mail. If the railroad's eminent domain theory is correct, it would have been entitled to interest from the time of the "taking" which would have been either when the Postmaster General issued authorizations for transporting the mail or when the mail was actually transported, but not when the periodic payments for the service were ordinarily made. The absurdity of attempting to fasten upon the Government a liability to pay interest from either of these points of time, which apparently led to the railroad's lesser claim, furnishes further support for our view that the regulatory and rate-making provisions of the Railway Mail Pay Act do not constitute a taking of private property.

VI

The Major Part of the Claim in Issue Is Barred by the Statute of Limitations

If, in the circumstances of this case, suit may be brought for a money judgment in the Court of Claims, the railroad's cause of action first accrued

on May 10, 1933, when its application to the Commission for a reexamination of rates was denied. Since the present suit was instituted on February 2, 1942, it follows that the portion of the railroad's claim for the period before February 2, 1936, is barred by the six-year limitation on actions fixed by Section 156 of the Judicial Code, 28 U. S. C. (1946 ed.) 262, now 28 U. S. C. 2501.[26]

The rates here in question were established on July 10, 1928, by an order of the Interstate Commerce Commission. The railroad accepted these rates without protest until April 1, 1931, when it applied to the Commission for a reexamination of the rates.[27] After an investigation and hearing, the Commission, on May 10, 1933, denied the application for increased compensation, holding that the established rates were fair and reasonable. A petition for reconsideration was denied by the Commission on October 3, 1933.[28] Thereafter, in a suit brought by the railroad in the United States District Court for the Southern District of Georgia, an order was entered setting aside the Commission's order and directing the Commission to take

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[26] The statute of limitations is jurisdictional in the Court of Claims. *American Standard Ship Fittings Corp.* v. *United States*, 70 C. Cls. 679. The amended petition, now before the Court, was not filed until December 28, 1944, more than six years after the date of the last claim.

[27] The Act provides that either the Postmaster General or any affected carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination. 39 U. S. C. 553.

[28] No provision is made in the Act for a petition for reconsideration.

further appropriate action. Pursuant to this decree the Commission held further hearings and entered an order on February 4, 1936, adhering to its former rates. On February 28, 1938, this Court held that the action was not properly brought before a three-judge court under the Urgent Deficiencies Act. *United States* v. *Griffin*, 303 U. S. 226. Four years after this Court's decision, on February 2, 1942, the petition commencing the present action was filed in the Court of Claims. The delay of four years is nowhere explained.

We submit that the issue between the railroad and the Government was clearly defined on May 10, 1933, the date the railroad's application for increased compensation was denied. No further action by the Commission was necessary to fix and define the claim asserted in this action. Thus, the court below (77 F. Supp. 197, 206) erred in holding that the amount of the claim was not ascertainable until February 4, 1936, when the Commission affirmed its prior action after reopening the case in obedience to the decree of a district court which lacked jurisdiction.

The period of limitations prescribed by the statute begins to run when the claim accrued (28 U. S. C. (1946 ed.) 262). Now 28 U. S. C. 2501. "As a proposition of general applicability to the statutory limitations it may be said that a cause of action has not accrued, so as to start the running of the limitation, until such time as suit upon it may

properly be brought." *Dusek* v. *Pennsylvania R. Co.*, 68 F. 2d 131 (C. A. 7); *Pettibone* v. *Cook County, Minnesota*, 120 F. 2d 850, 854 (C. A. 8); *City of Beach* v. *Goepfert*, 147 F. 2d 480 (C. A. 8); *Yager* v. *Liberty Royalties Corp.*, 123 F. 2d 44, 47 (C. A. 10). The claim in the instant case accrued on May 10, 1933, when the Commission denied the railroad's application for increased compensation. Any later action taken by the Commission would be relevant only if the statute of limitations were tolled or a new rate were established thereby. Since the later actions herein taken in no way altered or modified the established rates, they did not affect the amount of the railroad's claim and did not start the statute running anew. Nor is there any basis for contentions that such actions tolled the operation of the statute.

That the railroad has attempted to obtain relief through other proceedings which failed of success and thus has mistaken its remedy is of no legal consequence. *The L. E. Myers Co., Inc.* v. *United States*, 105 C. Cls. 459, 478; *Ylagan* v. *United States*, 101 C. Cls. 294; *John P. Moriarty, Inc.* v. *United States*, 97 C. Cls. 338; *Pink* v. *United States*, 85 C. Cls. 121. "The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit or the action abates or is dismissed, and, during the pendency

of the action, the limitation runs, the remedy is barred." *Willard* v. *Wood*, 164 U. S. 502, 523. *Fairclough* v. *Southern Pacific Co.*, 171 App. Div. 496, affirmed, 219 N. Y. 657; *Sweet* v. *Electric Light Co.*, 97 Tenn. 252; *American Theatre Co.* v. *Glasmann*, 95 Utah 303; *Jones* v. *Morris Plan Bank of Portsmouth*, 170 Va. 88. It should be noted that any hardship to the railroad caused by the operation of the statute can be ascribed only to its procrastination. If suit had been brought within a year after the decision of this Court in *United States* v. *Griffin*, 303 U. S. 226 (February 28, 1938), rather than four years later, no defense based upon the statute of limitations could have been raised.

CONCLUSION

Under the guise of "properly" construing an order of the Interstate Commerce Commission, the Court of Claims has attempted to usurp the functions of the Commission by nullifying the Commission's findings and substituting its own unauthorized ideas of fair and reasonable railway mail rates. The Court of Claims, without justification, has concluded that the approved rates were "confiscatory", despite the fact that its opinion expressly disclaims any finding based on the Fifth Amendment to the Constitution. On the other hand, the railroad claims recovery, with interest, on the theory of a "taking" under the Fifth Amendment, although the rates are the same as paid to comparable rail-

roads, and although the railroad which brought the suit has successfully resisted any attempt to relieve it from the business of which it complains. There is no valid answer to the Commission's finding that the mail service, per unit, has paid the complaining railroad two and one-half times as much as express service on the same railroad, and about six times as much as passenger service. If the judgment of the Court of Claims is approved, this railroad will be paid almost double the rates paid to any other comparable railroad, and it will receive per mail unit about five times what it received from express service, and almost twelve times per unit what it received from passenger service.

For the reasons set forth herein, it is submitted that the judgment of the Court of Claims is beyond its powers, and, in any event, is not warranted by the law or facts, and should be reversed.

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APPENDIX A

The so-called Railway Mail Pay Act of July 28, 1916, 39 Stat. 412, 425-431 provides:[1]

§ 523. *Free transportation for persons in charge of mails.*

Every railroad company carrying the mails shall carry on any train it operates and without extra charge therefor the persons in charge of the mails and when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials.

§ 524. *Conditions of railway service; adjustment of compensation.*

The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

§ 525. *Classes of routes enumerated.*

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service.

§ 526. *Full railway post-office car service.*

Full railway post-office car mail service shall

[1] The section numbers here used are those found in Title 39 of the United States Code.

be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorizations of full railway post-office cars shall be for standard-sized cars sixty feet in length, inside measurement, except as hereinafter provided.

§ 527. *Apartment railway post-office car service.*

Apartment railway post-office car mail service shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

§ 528. *Storage-car service.*

Storage-car mail service shall be service by cars used for the storage and carriage of mails in transit other than by full and apartment railway post-office cars. The authorizations for storage cars shall be for cars sixty feet in length, inside measurement, except as hereinafter provided. Storage space in units of three feet, seven feet, fifteen feet, and thirty feet, both sides of car, may be authorized in baggage cars at not exceeding pro rata of the rates hereinafter named for sixty-foot storage cars.

§ 529. *Service by full and apartment railway post-office cars and storage cars.*

Service by full and apartment railway post-

office cars and storage cars shall include the carriage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried.

§ 530. *Closed-pouch service.*

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

§ 531. *Rates of payment for classes of routes.*

The rates of payment for the services authorized in accordance with sections 524-541, 542-568 of this title shall be as follows, namely:

(a) *Full railway post-office car service.* For full railway post-office car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding $4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

(b) *Apartment railway post-office car service.* For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of

service by a fifteen-foot apartment car.

In addition thereto he may allow not exceeding $2.75 as a combined initial and terminal rate for each one-way trip of a thirty-foot apartment car and $2 as a combined initial and terminal rate for each one-way trip of a fifteen-foot apartment car.

(c) *Storage-car service.* For storage-car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding $4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

(d) *Closed-pouch service.* For closed-pouch service, at not exceeding 1½ cents for each mile of service when a three-foot unit is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized.

In addition thereto he may allow not exceeding 25 cents as the combined initial and terminal rate for each one-way trip of a three-foot unit of service and 50 cents as a combined initial and terminal rate for each one-way trip of a seven-foot unit of service.

§ 532. *Cars of less than standard lengths; cars of excess length.*

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by sections 526 and 527 of this title, and the railroad company

is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by section 531 of this title for the standard length so authorized. The Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths.

§ 533. *Initial and terminal rates to cover certain expenses; varying allowances for full railway post-office cars, apartment railway post-office cars, and storage cars.*

The initial and terminal rates provided for in section 531 of this title shall cover expenses of loading and unloading mails, switching, lighting, heating, cleaning mail cars, and all other expenses incidental to station service, and required by the Postmaster General in connection with the mails that are not included in the car-mile rate. The allowance for full railway post-office cars, apartment railway post-office cars, and storage cars may be varied in accordance with the approximate difference in their respective cost of construction and maintenance.

§ 534. *Computation of car-miles; railway post-office cars and apartment railway post-office cars.*

In computing the car-miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon.

§ 535. *Same; storage cars.*

In computing the car-miles of storage cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless the car to be used by the company in the return movement, or otherwise mutually agreed upon.

§ 536. *Land-grant roads.*

Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should be law direct, shall receive only 80 per centum of the compensation otherwise authorized by sections 524-541 and 542-568 of this title.

§ 537. *Style, construction, and maintenance of post-office cars; pay for unsound cars; steel cars.*

All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and fur-

nished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking-water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. The Postmaster General shall not approve or allow to be used, or pay for service by, any full railway post-office car not constructed of steel or steel underframe or equally indestructible material; and all full railway post-office cars accepted for this service and contracted for by the railroad companies shall be constructed of steel.

§ 538. *Facilities for carrying and handling mails; cars at station, station room; offices for employees.*

Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail

in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

§ 539. *Selection of trains; carrying on any train.*

The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper.

§ 540. *Service operated by railroad and steamboats.*

The provisions of sections 524-541, 542-568 of the title shall apply to service operated by railroad companies partly by railroad and partly by steamboats.

§ 541. *Transportation required in manner, under conditions, and with service prescribed by Postmaster General; compensation therefor.*

All railway common carriers are hereby re-

quired to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

§ 542. *Interstate Commerce Commission to fix and determine rates and compensation.*

The Interstate Commerce Commission is empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

§ 543. *Relation between the railroads as public-service corporations and the Government to be considered.*

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

§ 544. *Procedure for ascertaining rates.*

The procedure for the ascertainment of said rates and compensation shall be as provided in sections 545-554 of this title.

§ 545. *Filing to statement by Postmaster General with Interstate Commerce Commission showing transportation required.*

The Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mail; the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission.

§ 546. *Employment of clerical assistance; plan for transportation filed with Interstate Commerce Commission.*

The Postmaster General may employ such clerical and other assistance as shall be necessary to carry out the provisions of sections 524-541 and 542-568 of this title, and may rent quarters in Washington, District of Columbia, if necessary, for the clerical force engaged thereon, and pay for the same out of the appropriation for inland transportation by railroad routes. The Postmaster General shall file with the commission a comprehen-

sive plan for the transportation of the mails on said railways and shall embody therein what he believes to be the reasonable rate or compensation the said railway carriers should receive.

§ 547. *Notice by Interstate Commerce Commission to railroads; answer of railroads; hearings.*

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as provided by law for other hearings between carriers and shippers or associations.

§ 548. *Taking testimony, evidence, penalties, and procedure.*

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are made applicable.

§ 549. *Classification of carriers by Interstate Commerce Commission.*

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

§ 550. *Additional weighing of mails.*

Pending such hearings, and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of sections 524-541 and 542-568 of this title, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commission, shall provide therefor in the manner prescribed by law, but such weighing need not be for more than thirty days.

§ 551. *Orders of Interstate Commerce Commission establishing rate or compensation.*

At the conclusion of the hearing the commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation.

§ 552. *Percentage of rates allowed land-grant railroads.*

The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only 80 per centum of the compensa-

tion paid other railroads for transporting the mails and all service by the railroads in connection therewith.

§ 553. *Applications for reexaminations.*

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

§ 554. *Powers conferred on Interstate Commerce Commission.*

For the purposes of sections 524-541 and 542-568 of this title the Interstate Commerce Commission is vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

§ 555. *Conveyance under special arrangements in freight trains; rates.*

The provisions of sections 524-541 and 542-568 of this title respecting the rates of compensation shall not apply to mails conveyed under special arrangement in freight trains, for which rates not exceeding the usual and just freight rates may be paid, in accordance with the classifications and tariffs approved by the Interstate Commerce Commission.

§ 556. *Proof of performance of service.*

Railroad companies carrying the mails shall submit, under oath when and in such form as may be required by the Postmaster General, evidence as to the performance of service.

§ 557. *Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.*

The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail matter at such rates fixed by the Postmaster General.

§ 558. *Determination by Interstate Commerce Commission of postal carload or less rate for transportation of fourth-class matter and periodicals.*

The Postmaster General may, in his discretion, petition the Interstate Commerce Commission for the determination of a postal carload or less-than-carload rate for transportation of mail matter of the fourth class and periodicals, and may provide for and authorize such transportation, when practicable, at such rates, and it shall be the duty of

the railroad companies to provide and perform such service at such rates and on the conditions prescribed by the Postmaster General.

§ 559. *Distinguishing between several classes of matter.*

The Postmaster General may, in his discretion, distinguish between the several classes of mail matter and provide for less frequent dispatches of mail matter of the third and fourth classes and periodicals when lower rates for transportation or other economies may be secured thereby without material detriment to the service.

§ 560. *Return to mails; postal cards, stamped envelopes, and newspaper wrappers.*

The Postmaster General may return to the mails, when practicable for the utilization of car space paid for and not needed for the mails, postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the Postal Service.

§ 561. *Same; empty mail bags.*

The Postmaster General, in cases of emergency between October 1 and April 1 of any year, may return to the mails empty mail bags and other equipment theretofore withdrawn therefrom as required by law, and, where such return requires additional authorization of car space, pay for the transportation thereof as provided for herein out of the appropriation for inland transportation by railroad routes.

§ 562. *Weighing mail; computations.*

The Postmaster General may have the weights of mail taken on railroad mail routes, and computations of the average loads of the several classes of cars and other computations for statistical and administrative purposes made at such times as he may elect, and pay the expense thereof out of the appropriation for inland transportation by railroad routes.

§ 563. *Refusal to perform service at rates or methods of compensation provided by law.*

It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense.

§ 564. *New and additional service; reduction or discontinuance of service.*

New service and additional service may be authorized at not exceeding the rates provided in sections 524-541 and 542-568 of this title, and service may be reduced or discontinued with pro rata reductions in pay, as the needs of the Postal Service may require. No additional pay shall be allowed for additional service unless specifically authorized by the Postmaster General.

§ 565. *Special contracts for transportation; reports of.*

The Postmaster General is authorized to make special contracts with the railroad com-

panies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those specified in sections 524-541 and 542-568 of this title.

§ 566. *Service over property owned by another company; over land-grant companies.*

Service over property owned or controlled by another company or a terminal company shall be considered service of the railroad company using such property and not that of the other or terminal company. Service over land-grant road shall be paid for as provided in sections 524-541 and 542-568 of this title.

§ 567. *Failure to furnish cars or compartments.*

If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper.

§ 568. *Deductions from pay for reduction in or nonperformance of service.*

The Postmaster General may make deductions from the pay of railroad companies carrying the mails under the provisions of sections 524-541 and 542-568 of this title

for reduction in service or infrequency of service where, in his judgment, the importance of the facilities withdrawn or reduced requires it, and impose fines upon them for delinquencies. He may deduct the price of the value of the service in cases where it is not performed, and not exceeding three times its value if the failure be occasioned by the fault of the railroad company.

R.S. § 3964 (39 U. S. C. 481) provides as follows:

What are post roads.

The following are established post roads:

* * * * *

All railroads or parts of railroads and all air routes which are now or hereafter may be in operation.

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